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No. ___ 0615 [illegible] 2007

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IN THE

Supreme Court of the United States

CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY, *et al.*,
Petitioners,

v.

ERIC R. DINALLO, SUPERINTENDENT,
NEW YORK STATE INSURANCE DEPARTMENT,
Respondent.

On Petition for a Writ of Certiorari to the New York Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the State may compel a church or church entity, contrary to its religious teachings, to include contraceptives in the prescription drug plan that it provides to its employees, and thereby to finance conduct that the church teaches is sinful.

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rule 14.1, petitioners state that all parties to the proceedings in the New York Court of Appeals were:

> Catholic Charities of the Diocese of Albany; Servants of Relief for Incurable Cancer; Temple Baptist Church; Our Lady of Consolation Geriatric Care Center; Delta Development of Western New York, Inc.; St. John the Baptist Church; Catholic Charities of the Diocese of Ogdensburg; Bishop Ludden High School; First Bible Baptist Church; Carmelite Sisters for the Aged and Infirm, Inc., plaintiffs;
>
> Gregory V. Serio, Superintendent, New York State Insurance Department, defendant.[1]

Pursuant to Supreme Court Rule 29.6, petitioners state as follows:

> • Catholic Charities of the Diocese of Albany is a nonprofit corporation incorporated pursuant to the provisions of a special act of the New York State Legislature. Catholic Charities of the Diocese of Albany has no parent corporations and is neither publicly held nor affiliated with any entity that is so held. Catholic Charities of the Diocese of Albany has as an individual corporate member the Bishop of the Roman Catholic Diocese of Albany.
>
> • Temple Baptist Church is a religious corporation organized pursuant to the New York Religious Corporations Law. Temple Baptist Church has no parent corpo-

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[1] Gregory V. Serio, the named defendant in the decision under review, is no longer the Superintendent of the New York State Insurance Department. Eric R. Dinallo was confirmed by the New York State Senate as Superintendent on April 18, 2007.

rations and is neither publicly held nor affiliated with any entity that is so held.

• Our Lady of Consolation Geriatric Care Center is a New York nonprofit corporation. Our Lady of Consolation Geriatric Care Center has no parent corporations and is neither publicly held nor affiliated with any entity that is so held.

• Delta Development of Western New York, Inc. is a New York nonprofit corporation. Delta Development of Western New York, Inc. has no parent corporations and is neither publicly held nor affiliated with any entity that is so held.

• The Roman Catholic Church of St. John the Baptist (St. John the Baptist Church) is a religious corporation organized pursuant to the New York Religious Corporations Law. St. John the Baptist Church has no parent corporations and is neither publicly held nor affiliated with any entity that is so held.

• Catholic Charities of the Diocese of Ogdensburg is a New York nonprofit corporation incorporated pursuant to the provisions of a special act of the New York State Legislature. Catholic Charities of the Diocese of Ogdensburg has no parent corporations and is neither publicly held nor affiliated with any entity that is so held. Catholic Charities of the Diocese of Ogdensburg has as an individual corporate member the Bishop of the Roman Catholic Diocese of Ogdensburg.

• Bishop Ludden High School is a diocesan high school chartered by the New York Department of Education. Bishop Ludden High School has no parent corporations and is neither publicly held nor affiliated with any entity that is so held.

• First Bible Baptist Church is a religious corporation organized pursuant to the New York Religious Corporations Law. First Bible Baptist Church has no parent corporations and is neither publicly held nor affiliated with any entity that is so held.

• Carmelite Sisters for the Aged and Infirm, Inc. is a New York nonprofit corporation. Carmelite Sisters for the Aged and Infirm, Inc. has no parent corporations and is neither publicly held nor affiliated with any entity that is so held.

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On Petition for a Writ of Certiorari to the New York Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Catholic Charities of the Diocese of Albany, *et al.* respectfully petition for a writ of certiorari to review the decision and judgment entered on October 19, 2006, by the New York Court of Appeals.

OPINIONS AND ORDERS BELOW

The opinion of the New York Court of Appeals is reported at 7 N.Y.3d 510, 859 N.E.2d 459 (2006) and is reproduced in the Appendix ("App.") at 1a. The order of the Court of Appeals denying petitioners' motion for reargument is reported at 8 N.Y.3d 866, 863 N.E.2d 1019 (2007) and is reproduced in the Appendix at 95a. The opinion of the Appellate Division is reported at 808 N.Y.S.2d 447, 28 A.D.3d 115 (App. Div. 2006) and is reproduced in the

Appendix at 18a. The opinion of the trial court, the Supreme Court, is unreported and is reproduced in the Appendix at 67a.

JURISDICTION

The judgment of the New York Court of Appeals was entered on October 19, 2006. A timely motion for reargument was denied on February 20, 2007. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1257(a) (2006).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The relevant portions of New York's Women's Health and Wellness Act ("WHWA"), N.Y. Ins. Law § 3221 (*l*)(16) (McKinney 2006 & Supp. 2007) and N.Y. Ins. Law § 4303(cc) (McKinney 2007), are reproduced in the Appendix at 97a and 99a.

STATEMENT OF THE CASE

The New York Court of Appeals has upheld a law that requires church entities, including those of the Catholic and Baptist Churches, to include contraceptives in the prescription drug plans that they provide to their employees—or to deprive their employees of prescription drug coverage altogether. This is now the second case in which a state's highest court has upheld a law that coerces religious institutions to

subsidize non-governmental conduct that conflicts with their own religious beliefs.[1]

Under the approach taken by the Court of Appeals, which purported to apply this Court's precedents, neither the Free Exercise Clause nor the Free Speech Clause provides *any* protection against such laws, as long as they apply neutrally to non-religious entities as well as religious ones. Whether the Court of Appeals misconstrued those precedents is an important question that warrants this Court's consideration.

A. Religious Beliefs at Issue

This case implicates at least two important religious principles of the Catholic Church.

First, the Catholic Church teaches that contraception is "intrinsically evil." *See, e.g.*, 2 Court of Appeals Record on Appeal ("N.Y. App.") 782, 785. This is a clear historic and theologically grounded teaching of the Catholic faith.[2] In keeping with this teaching, church entities cannot facilitate or promote, directly or indirectly, the practice of contraception. *See, e.g.*, 2 N.Y. App. 781, 793, 870. Accordingly, church entities are prohibited from paying for or otherwise providing contraceptives. *Id.* The same is true with respect to several other procedures, including abortion, voluntary sterilization, and *in vitro* fertilization. *Id.*

Second, the Catholic Church teaches that employers are obligated to provide just wages and benefits to their employees. Thus, as explained in an affidavit from an expert, "Roman Catholic institutional employers, consistent with Roman Catholic religious and moral teaching in this area,

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[1] The Supreme Court of California has upheld a similar statute. *See Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004), *cert. denied*, 543 U.S. 816 (2004).

[2] *See* John T. Noonan, Jr., *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* (1965).

must provide their full time employees with health care benefits that include access to prescription medications." 2 N.Y. App. 793.

The Baptist Church shares similar beliefs. The Baptist Church teaches that abortifacient contraception "violates religious beliefs rooted in the Scriptures" and is "morally . . . illicit and unacceptable." 2 N.Y. App. 505, 510-11. Like the Catholic petitioners, the Baptist petitioners offer their employees health coverage that includes access to prescription medications, based on their religious commitment to "live according to the values of the Scriptures." *Id.*

B. New York's Women's Health and Wellness Act

The WHWA, enacted in 2002, requires that all group insurance policies that include coverage for prescription drugs must provide coverage for the cost of prescribed contraceptive drugs or devices. App. 97a, 99a.

The legislative history reveals that the state legislature was well aware that this requirement would conflict with the religious beliefs of a number of churches and affiliated organizations. Indeed, as originally introduced and passed by the State Senate, the law would have contained a religious exemption for which all petitioners would have qualified. 1 N.Y. App. 131, 149-50. As ultimately enacted, however, the religious exemption was confined to a narrow category of "religious employer[s]" that excludes the vast majority of church-related employers in New York. App. 97a, 99a. The law defines a "religious employer" as "an entity for which each of the following is true:"

> (a) The inculcation of religious values is the purpose of the entity.
>
> (b) The entity primarily employs persons who share the religious tenets of the entity.

> (c) The entity serves primarily persons who share the religious tenets of the entity.
>
> (d) The entity is a nonprofit organization as described in Section 6033(a)(2)(A)i or iii, of the Internal Revenue Code of 1986, as amended.

App. 97a, 99a. The legislature knew that restricting the exemption in this way would subject many Catholic Church entities to the contraceptive mandate. A number of legislators found the Act's application to such arms of the church to be offensive and unconstitutional, but their views did not prevail. *See, e.g.*, 1 N.Y. App. 330-31, 358-59, 437-38.

Under the law, an entity meeting the restrictive criteria for a "religious employer" is not required to provide contraceptive coverage if doing so would be "contrary to the religious employer's religious tenets." App. 97a, 99a. But those who work for exempt "religious employer[s]" are not left without coverage. Those employees are eligible for contraceptive coverage through a state-mandated rider. App. 98a, 100a. They have the right to purchase the coverage rider directly from their employer's insurance provider "at the prevailing small group community rate for such a rider," App. 98a, 100a, which the Supreme Court estimated to be "on the order of $1.00 to $2.00 per month." App. 52a, 71a. There is no comparable rider provision for the employees of employers who opt not to provide prescription coverage at all.

C. Petitioners

Petitioners are nine Catholic churches, Baptist churches, or entities that are juridically part of the Catholic Church. They provide a broad range of educational and social services—including health care, food, clothing, affordable housing, drug prevention and treatment, domestic violence shelters, and immigration settlement programs. Those services, while

addressing the physical needs of the recipients, are vital and integral parts of the churches' ministry.[3]

None of petitioners qualifies for the "religious employer" exemption contained in the New York law, for one or more reasons. All petitioners provide their services to people in need, regardless of their religious beliefs, and thus cannot say that they serve "primarily" those who share their religious tenets. In addition, some cannot certify that they "primarily" employ persons who share their religious tenets. Some do not have "the inculcation of religious values" as their "purpose," although all transmit religious values through their religiously motivated work. Finally, some do not qualify under the designated Internal Revenue Code provision, although all petitioners are charitable organizations exempt from federal taxation.

As a result, the WHWA's contraceptive mandate has thrust petitioners into a religiously untenable position. They must choose between (i) obeying their church's doctrine on contraception or (ii) remaining faithful to their church's teaching on providing just wages and benefits to employees, including prescription drug coverage. Pending the outcome of this case, petitioners are currently providing prescription drug coverage and complying with the contraceptive mandate under protest.

Brief descriptions of each petitioner are as follows:

- Catholic Charities of the Diocese of Albany is operated in connection with the Roman Catholic Diocese

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[3] *See, e.g.*, Benedict XVI, Encyclical Letter *Deus Caritas Est* ¶ 25(a) (2005) ("The Church's deepest nature is expressed in her three-fold responsibility: of proclaiming the word of God . . . , celebrating the sacraments . . . , and exercising the ministry of charity . . . . These duties presuppose each other and are inseparable. For the Church, charity is not a kind of welfare activity which could equally well be left to others, but is a part of her nature, an indispensable expression of her very being.").

of Albany, New York, and is an ecclesiastical part of the Catholic Church. It provides a wide variety of human service programs. 2 N.Y. App. 526-32, 867.

• Temple Baptist Church is an independent Evangelical congregation affiliated with the Baptist Bible Fellowship International. The Church engages in a range of scripturally based human service outreach programs. It is a "religious corporation" under New York law.[4] 2 N.Y. App. 503-07.

• Our Lady of Consolation Geriatric Care Center operates a nursing and rehabilitative care center in connection with the Roman Catholic Diocese of Rockville Centre, New York. 2 N.Y. App. 651-55.

• Delta Development of Western New York, Inc. offers housing services and assistance. It is operated in connection with the Roman Catholic Diocese of Buffalo, New York. 2 N.Y. App. 632-37.

• St. John the Baptist Church is a Roman Catholic Church that is part of the Roman Catholic Diocese of Brooklyn. A "religious corporation" under New York law, it operates St. John the Baptist School, an elementary school serving the Bedford-Stuyvesant community in Brooklyn, New York. 2 N.Y. App. 673-78.

• Catholic Charities of the Diocese of Ogdensburg is operated in connection with the Roman Catholic Diocese of Ogdensburg, New York. It provides a variety of religiously motivated human service programs. 2 N.Y. App. 583-88.

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[4] New York's Religious Corporations Law applies to certain corporations "created for religious purposes." *See* N.Y. Relig. Corp. Law § 2 (McKinney 1990 & Supp. 2007) (defining a "Religious Corporations Law corporation," otherwise known as a "religious corporation").

• Bishop Ludden High School serves the community of Syracuse, New York, and is operated in connection with the Roman Catholic Diocese of Syracuse. 1 N.Y. App. 476-81.

• First Bible Baptist Church is an independent Evangelical congregation affiliated with the Baptist Bible Fellowship International. The Church engages in various human service outreach programs in the Rochester area of New York and operates a K-12 school, the Northstar Christian Academy. It is a religious corporation under New York law. 2 N.Y. App. 508-12.

• The Carmelite Sisters for the Aged and Infirm is a Roman Catholic congregation of Pontifical Rite that staffs long-term care facilities at multiple locations throughout New York. 2 N.Y. App. 608-13.[5]

D. Decisions Below

Petitioners filed suit in the New York Supreme Court for Albany County on December 30, 2002, seeking declaratory and injunctive relief against application of the WHWA's contraceptive mandate. Petitioners sought this relief under the First Amendment's Free Exercise and Establishment Clauses, as well as the First Amendment's protections for free speech and association. Petitioners also sought relief under provisions of the New York Constitution. In a decision and order dated November 25, 2003, the Supreme Court granted respondent's motion for summary judgment and dismissed petitioners' complaint. App. 91a.

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[5] A tenth plaintiff below, the Servants of Relief for Incurable Cancer, which operates two nursing facilities in connection with the Roman Catholic Archdiocese of New York, was granted an exemption from the contraceptive mandate while this case was pending and has issued a group policy without contraceptive coverage. 2 N.Y. App. 513-16; 3 *id.* at 1482-90.

Petitioners appealed the ruling to the intermediate appellate court, the Appellate Division, on the basis of both federal and state constitutional guarantees. The Appellate Division affirmed the Supreme Court's dismissal of petitioner's complaint by a 3-2 vote. App. 18a. The dissenting judges explained that the contraceptive mandate undermines petitioners' religious message, pointing out that "[i]t is not enough for religious employers to say that they are morally opposed to contraception if they are simultaneously paying for employees to obtain it; the condemnation of the act is inauthentic if religious employers are paying for what they believe to be immoral." App. 60a (quoting a commentator).

Again invoking both federal and state constitutional protections, including the Free Exercise and Free Speech Clauses, petitioners appealed to the New York Court of Appeals. On October 19, 2006, the Court of Appeals affirmed, based on its view that this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), had adopted an "*inflexible rule* . . . that no person may complain of a burden on religious exercise that is imposed by a generally applicable, neutral statute." App. 9a (emphasis added). The court noted that the "sincerity of [petitioners'] beliefs, and the centrality of those beliefs to their faiths, are not in dispute." App. 4a. Moreover, the court acknowledged that New York's law presented a "serious" burden to petitioners' religious practices. App. 13a. Nonetheless, the court held that *Smith* represented "an insuperable obstacle to plaintiffs' federal free exercise claim." App. 9a.

In *Smith*, this Court had observed that "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press." 494 U.S. at 881. "Assuming that [this] language

does create an exception to the general rule of *Smith*," the Court of Appeals held the exception inapplicable because, in its view, petitioners' free speech and free association claims were "insubstantial." App. 7a-8a. The contraceptive mandate, the court held, "does not interfere with plaintiffs' right to communicate, or to refrain from communicating, any message they like." App. 8a. The sole support cited for that conclusion was this Court's decision in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 126 S. Ct. 1297 (2006). App. 8a.

The court further held that "church autonomy is not at issue in this case," App. 8a, notwithstanding the fact that the WHWA dictates how churches deal with their employees on matters directly related to their religious beliefs.

Based on its view that *Smith* had adopted an "inflexible rule" presenting an "insuperable obstacle" to petitioners' claim, the Court of Appeals did not even address petitioners' argument that the challenged provisions of the Act were not rationally related to its stated purposes. Petitioners had argued that denying the "religious employer" exemption to employers like them actually undermined the objective of expanding contraceptive coverage. That is so because the Act encourages religious objectors who are ineligible for the "religious employer" exception to deny the prescription drug coverage that they would otherwise be prepared to provide. If those employers were exempt, they could continue to provide general prescription drug coverage, and their employees would be eligible for contraceptive coverage under the state-mandated rider. The court neither acknowledged these peculiar features of the Act nor considered their impact on its constitutionality. Instead, the court construed *Smith* as a barrier to *any* review of the law, evidently reading *Smith* to mean that not even rational basis review is required under the Free Exercise Clause once it is determined that a law is neutral and generally applicable. App. 9a.

Petitioners filed a timely motion for reargument before the Court of Appeals, which was denied on February 20, 2007. App. 95a.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ to clarify the meaning and scope of its rulings in *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* ("*FAIR*"), 547 U.S. 47, 126 S. Ct. 1297 (2006), and to resolve First Amendment questions of national importance. There are at least twenty-three states that have adopted laws mandating contraceptive coverage—only seven of which contain comprehensive exemptions for religious employers.[6] The issues in this case, therefore—as

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[6] Five states provide no exemption for religious employers. *See* Ga. Code Ann. § 33-24-59.6 (2005); Iowa Code Ann. § 514C.19 (West Supp. 2007); N.H. Rev. Stat. Ann. §§ 415:18-i, 420-A:17-c, 420-B:8-gg (2004); Vt. Stat. Ann. tit. 8 § 4099c (2006); Wash. Admin. Code § 284-43-822 (2005).

Eleven states, including New York, have exemptions that fail to cover all religiously affiliated employers. *See* Ariz. Rev. Stat. §§ 20-826, 20-1057.08, 20-1402, 20-1404, 20-2329 (Supp. 2006); Ark. Code Ann. §§ 23-79-1101 to 23-79-1104 (LexisNexis Supp. 2005); Cal. Health & Safety Code § 1367.25 (West Supp. 2007), Cal. Ins. Code § 10123.196 (West 2005); Haw. Rev. Stat. Ann. §§ 431:10A-116.6, 431:10A-116.7, 432:1-604.5 (Michie 2004); Me. Rev. Stat. Ann. tits. 24, § 2332-J; 24-A, §§ 2756, 2847-G, 4247 (West 2000 & Supp. 2006); Mass. Gen. Laws chs. 175, § 47W; 176A, § 8W; 176B, § 4W; 176G, § 4O (West Supp. 2007); N.J. Stat. Ann. §§ 17:48-6ee, 17:48A-7bb, 17:48E-35.29, 17:48F-13.2, 17B:26-2.1y, 17B:27-46.1ee, 17B:27A-7.12, 17B:27A-19.15, 26:2J-4.30 (West 2006, 2007 & Supp. 2007); Nev. Rev. Stat. Ann. §§ 689A.0415, 689A.0417, 689B.0376, 689B.0377, 695B.1916, 695B.1918, 695C.1694, 695C.1695 (Michie 2003 & Supp. 2005); N.C. Gen. Stat. §§ 58-3-178, 58-50-155 (LexisNexis 2005); R.I. Gen. Laws §§ 27-18-57, 27-19-48, 27-20-43, 27-41-59 (LexisNexis 2002).

Seven states provide broader exemptions. *See* Conn. Gen. Stat. Ann. §§ 38a-503e, 38a-530e (West Supp. 2007); Del. Code Ann. tit. 18, § 3559 (Supp. 2006); Md. Code Ann., Ins. § 15-826 (LexisNexis 2006); Mo.

well as the broader principles at stake—affect religious institutions throughout the country.

There is, to our knowledge, no other context in which courts have upheld coerced financing by a church institution of private, non-government conduct that the church teaches is morally wrong. This Court should grant the writ to clarify that its prior decisions do not mandate this result, and to offer guidance on the principles that should govern such cases in the future.

Churches in this country often espouse views at odds with those of the majority—and often on pressing social and cultural issues of national prominence. Contraception is but one example of a range of issues for which this is true. Abortion is perhaps the most prominent example. This petition asks the Court to consider just how far the First Amendment permits the state to go in imposing its own view on such controversial issues on churches that sincerely hold contrary views.

The Court of Appeals thought that *Smith* and *FAIR* foreclosed any protection for church entities that believe the conduct they are being asked to subsidize is sinful, so long as non-church entities, which have no institutional position on the subject, are also subject to the law's requirements. In other words, the Constitution places no obligation on the legislature to respect a church entity's views on the subject at all. That conclusion, however, rests upon a misinterpretation of this Court's decisions in *Smith* and *FAIR* and conflicts

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Ann. Stat. § 376.1199 (West 2002); N.M. Stat. Ann. §§ 59A-22-42, 59A-23-4, 59A-46-44 (LexisNexis Supp. 2006); Tex. Ins. Code Ann. §§ 1369.104 to 1369.108 (Vernon 2006); W. Va. Code Ann. §§ 33-16E-1 to 33-16E-7 (LexisNexis 2006). Illinois has no such exemption in its contraceptive coverage statute, 215 Ill. Comp. Stat. Ann. § 5/356z.4 (West Supp. 2006), but it does have a comprehensive Health Care Right of Conscience Act, 745 Ill. Comp. Stat. Ann. 70/1-70/14 (West 2002).

with the holdings of this Court and other courts in several important respects.

As explained below, this case provides the Court with an opportunity (a) to answer a question that was not decided in *FAIR*—whether coerced subsidization of private conduct can amount to coerced endorsement of that conduct in violation of free-speech principles; (b) to resolve a conflict among the circuits as to whether there is an exception from the holding of *Smith* for "hybrid" claims that free speech, as well as free exercise, rights have been violated; (c) to address unresolved questions as to the applicability of *Smith* to claims of institutional church autonomy; and (d) to resolve the conflict created by the Court of Appeals' opinion on whether even rational basis review is applicable to a neutral law of general applicability.

I. THE COURT SHOULD CLARIFY THE MEANING OF *EMPLOYMENT DIVISION V. SMITH* AND *RUMSFELD V. FAIR*.

A. The Court in *FAIR* Left Unresolved the Important Question Whether Coerced Subsidization of Private Activity Implicates the Right of Free Speech.

In *Smith*, the Court noted that even neutral, generally applicable laws are vulnerable to attack based on the Free Exercise Clause "in conjunction with other constitutional protections." 494 U.S. at 881. Among those "other constitutional protections," the Court noted, were "freedom of speech" and "freedom of association." *Id.* at 881-82. Petitioners have argued that this case presents precisely the "hybrid situation" that warrants strict scrutiny under *Smith*. *Id.* at 882.

In addition to claiming a violation of their right to free exercise of religion, petitioners have argued that New York's contraceptive mandate interferes with their right of free

speech. It does so by coercing them to subsidize—and thereby endorse—conduct that they seek to condemn as wrong. At the very least, petitioners have argued, subsidizing such conduct would undermine the strength and effectiveness of the church's message condemning the conduct as immoral.[7]

The Court of Appeals read this Court's ruling in *FAIR* as foreclosing this argument. But *FAIR* did not address any claim of compelled *subsidization* by a *church* entity of *private* behavior that undercuts its religious message. This case would be the first such case that the Court has addressed, and it presents an opportunity to clarify the meaning and implications of *FAIR* in this context.

In *FAIR*, this Court explicitly reaffirmed "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." 126 S. Ct. at 1309 (quoting *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 573 (1995)). That principle was inapplicable in *FAIR*, the Court held, because the requirement to accommodate military recruiters on campus "does not sufficiently interfere with any message of the school." *Id.* at 1310. Moreover, the law in *FAIR* did not raise any issue of coerced subsidization of any message, because the required accommodations were "not of a monetary nature." *Id.* at 1307 n.4. In addition, the Court noted, its "compelled-subsidy cases involved subsidizing private speech," not government speech. *Id.*

This case is obviously different. It involves accommodations "of a monetary nature." The subsidized activity is not that of the government, but that of *private* individuals. And the churches affected by this law, unlike the law schools in *FAIR*, were formed for expressive purposes, including the

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[7] Petitioners have also claimed that the contraceptive mandate interferes with the right of their members to associate with others to promote a set of beliefs of their own choosing.

very purpose of imparting views about morality. Indeed, "a church's message . . . is of singular importance." *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 704 (7th Cir. 2003). And the law at issue here interferes dramatically with the religious message that the petitioner church entities seek to convey.[8]

FAIR cannot reasonably be read, as the Court of Appeals evidently read it, to foreclose the claim of coerced subsidization and endorsement that these petitioners raise, and prior decisions of this Court offer substantial support for such a claim. *FAIR* itself confirmed that "[c]itizens may challenge compelled support of private speech." 126 S. Ct. at 1307 n.4 (alteration in original) (quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005)). Indeed, this Court has held that an individual cannot be required to subsidize expressive activities that he opposes in a variety of settings.

In *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-35 (1977), the Court held that it violated the First Amendment rights of state employees to require them to provide financial support for ideological union activities unrelated to collective bargaining.[9] And in *Keller v. State Bar*

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[8] As the chief executive officer of Catholic Charities of the Diocese of Albany explained in an affidavit, the contraceptive mandate, with which petitioners are currently complying under protest, has not only "placed Catholic Charities in direct conflict . . . with the doctrines, beliefs and disciplines of the Roman Catholic Church"; it "has generated pervasive confusion among its employees with respect to its mission, philosophy and values." 3 N.Y. App. 1378-79.

[9] Although the Court reaffirmed its previous rulings that the state had an overriding interest that justified compelling employees to subsidize the collective bargaining activities of the union, it recognized that even that form of compelled subsidization might interfere with an employee's "freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit." *Abood v. Detroit Bd. Of Educ.*, 431 U.S. 209, 222 (1977). In an observation that is pertinent to this case, the Court noted that an employee's "moral or religious views about the desirability of abortion

of California, 496 U.S. 1, 16 (1990), the Court held that state bar members could not be compelled to finance political and ideological activities with which they disagreed. In both cases, the Court recognized that compelled subsidization amounted to a compelled message of approval or support in violation of the First Amendment.

Of course, this case does not involve compelled support of private *speech*, but rather compelled subsidization of private *conduct*. But the claim here is that coerced subsidization of that private conduct places petitioners in the position of appearing to endorse that conduct—or, at the very least, that it undermines their message of disapproval.[10] This Court has not previously addressed such a claim—because, as we have noted, laws like this one are the first of their kind. There is, therefore, a substantial unresolved question whether coercing a church entity to subsidize private conduct that it condemns undermines the message it wishes to convey on the subject, in violation of the First Amendment.[11]

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may not square with the union's policy in negotiating a medical benefits plan." *Id.*

[10] This claim is unlike the claim by the law schools in *FAIR* that treating military and nonmilitary recruiters alike could be viewed as sending the message that they approve of a particular military policy. *See* 126 S. Ct. at 1310. Here petitioners are being coerced to subsidize the particular behavior that they wish to condemn as immoral.

[11] Our argument is limited to the coerced subsidization of *non-governmental* conduct. A citizen may be compelled to pay taxes to support the general activities of government even when he objects to particular activities on religious grounds. *See, e.g., United States v. Lee*, 455 U.S. 252, 258-61 (1982). That is principally because "[t]he tax system could not function" if individuals and organizations could pick and choose the policies that they could in conscience support. *Id.* at 260. But it also reflects the reality that compliance with such a fundamental duty of citizenship can hardly be understood as an expression of support for all of the government's policies. In *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), this Court held that citizens "have no First Amendment

There is no question that financial support is a form of sponsorship or endorsement. When an organization pays for an activity, the message that is ordinarily communicated is that the organization endorses or approves of the activity. That is at least in part why direct government funding of religious activity gives rise to Establishment Clause concerns. *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 846-47 (1995) (O'Connor, J., concurring). More generally, this Court has emphasized that the government's own spending can be used to express encouragement for certain types of conduct over others—that is, legislatures can "make a value judgment" and "implement that judgment by the allocation of public funds." *Maher v. Roe*, 432 U.S. 464, 474 (1977). Indeed, the government chooses to fund certain activities and not others precisely to *"encourage*[] . . . activity deemed in the public interest." *Harris v. McRae*, 448 U.S. 297, 315 (1980) (emphasis added). In *Harris* and *Maher*, the Court upheld legislative decisions to encourage "childbirth over abortion by means of subsidization of one and not the other." *Harris*, 448 U.S. at 315. What is true of government spending is also true of private spending.

When a religious institution subsidizes particular private conduct, the inescapable message is that it does not disapprove of that conduct. A religious institution cannot communicate an effective message that conduct is sinful at the same time that it pays for that conduct to occur. In particular, petitioners cannot persuasively communicate their church's teaching that contraceptive use is immoral if they simultaneously pay for contraceptives for their employees. At the least, petitioners are entitled to reach that judgment. As the Court emphasized in *Boy Scouts of America v. Dale*, "we must . . . give deference to an association's view of what would impair its expression." 530 U.S. 640, 653 (2000).

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right not to fund government speech," but specifically noted that "[c]itizens may challenge compelled support of private speech." *Id.* at 562.

In the *Boy Scouts* case, this Court held that the Boy Scouts' "freedom of expressive association" prevented the state from enforcing its public accommodations law to require the inclusion of a gay assistant scoutmaster. 530 U.S. at 648. Just like the contraceptive mandate at issue in the instant case, the Court held that the state law would "force the organization to send a message, both to the youth members and the world, that the [organization] accepts [the] conduct as a legitimate form of behavior." *Id.* at 653.

Likewise, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), the Court held unanimously that the organizers of a St. Patrick's Day parade had a First Amendment right to exclude a gay and lesbian group whose presence was thought to communicate a message about homosexual conduct that the organizers "did not like." *Id.* at 574. The parade organizers had that right even though they had no particular message on the subject that they wished to convey—only a preference "not to propound a particular point of view." *Id.* at 575. Again, the "principle of speaker's autonomy" prevailed. *Id.* at 580.

Petitioners and their supporters have an even stronger right than parade organizers and the Boy Scouts to join together in an organization that stands for something. They have the additional protection of the Free Exercise Clause. And if non-religious organizations have a constitutional right to exclude individuals whose mere presence might send a message on the subject of homosexuality that they did not like, then how much more clear it must be that a church organization has a right not to subsidize private conduct that contradicts its teachings.

The compelled subsidization in this case strikes at the heart of the Church's ability to communicate its unambiguous commitment to basic moral teachings and to form associations, like petitioners, that maintain their adherence to those moral teachings. Indeed, one can scarcely think of a more direct

and substantial interference with the religious mission of a church. If the State can coerce the Catholic Church and its social welfare arms to pay for contraceptives, it can force them to pay for abortions or for other private conduct that contradicts their teachings. But the First Amendment protects the right of these church entities "to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). The Court should grant the writ to preserve that bedrock principle.

B. There Is a Conflict Among the Circuits on the Application of *Smith*'s Hybrid Rights Doctrine.

There is a split among the circuits on how to interpret this Court's observation in *Smith* that strict scrutiny has been applied in "hybrid situation[s]" involving "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections." 494 U.S. at 881-82.

Two circuits have specifically endorsed the hybrid rights approach. They have held that in order to obtain strict scrutiny for a free exercise claim, a plaintiff need only assert a "colorable" companion constitutional claim—that is, a claim with a "fair probability or a likelihood, but not a certitude, of success on the merits." *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295-97 (10th Cir. 2004) (quotations omitted); *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999).

In contrast, at least two circuits have expressly rejected the hybrid rights approach. *See Leebaert v. Harrington*, 332 F.3d 134, 143-44 (2d Cir. 2003) (calling *Smith*'s hybrid rights discussion "dicta and not binding on this court" (quoting *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001)); *Kissinger v. Bd. of Trs.*, 5 F.3d 177, 180 (6th Cir.

1993) (refusing to "use a stricter legal standard" to evaluate hybrid claims absent further explanation from this Court).[12]

The New York Court of Appeals did not take sides in the conflict among the circuits on this issue. It "[a]ssum[ed] that the [hybrid rights] language [in *Smith*] does create an exception to the general rule of *Smith*," but found the exception inapplicable because it concluded that petitioners' free-speech and association claims were "insubstantial." App. 7a-8a. But the split in authority is nevertheless an additional reason to grant the petition. The free speech and association claims in this case are not insubstantial, for the reasons stated. The case, therefore, affords an opportunity to clarify once and for all what kinds of "hybrid" claims, if any, give rise to strict scrutiny.

C. There Are Unresolved Questions Concerning the Scope of a Church's Institutional Autonomy Rights After *Smith*.

Smith involved only "individual" rights. 494 U.S. at 876, 878-79. This case involves the *institutional* rights of a church. Specifically, it involves the church's freedom to conduct its relations with its employees—those whom it

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[12] In addition to this clear split between the Ninth and Tenth Circuits, on the one hand, and the Second and Sixth Circuits, on the other, three other circuits have indicated that a companion constitutional claim must meet at least some threshold of merit before strict scrutiny will be applied. *See Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 764-65 (7th Cir. 2003) (finding speech, assembly, and equal protection claims each independently lacking merit, and thus concluding that no hybrid claim exists); *Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001) (rejecting hybrid claims where the plaintiff's companion free speech claim was "untenable"); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995) (holding that no hybrid claim existed where the plaintiffs' allegations failed to implicate "an independently protected constitutional protection").

employs to carry out its religious mission—in accordance with its religious beliefs.

In *Smith*, the Court noted the continuing validity of prior decisions protecting a church's right to institutional autonomy—*Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); and *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). *See Smith*, 494 U.S. at 877. Those decisions recognize that the protections of the First Amendment extend not only to matters of faith, but also to "church administration," *Serbian Eastern Orthodox Diocese*, 426 U.S. at 710, "internal organization," *id.* at 713, and "the operation of . . . churches," *Kedroff*, 344 U.S. at 107.

This case presents an important, unresolved question concerning the reach of a church's institutional freedom. Applying the precedents reaffirmed in *Smith*, lower courts have held uniformly that the First Amendment protects the right of a church to make decisions about the employment of those who implement the church's religious mission.[13]

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[13] *See, e.g., Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007) (resident in hospital's clinical pastoral program); *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006) (university chaplain), *cert. denied*, 2007 U.S. Lexis 4357 (Apr. 23, 2007); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698 (7th Cir. 2003) (communications manager); *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000) (director of music ministry and part-time music teacher); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000) (minister); *Combs v. Cent. Tex. Annual Conf. of United Methodist Church*, 173 F.3d 343 (5th Cir. 1999) (minister); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996) (professor of canon law); *see also Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648 (10th Cir. 2002) (church autonomy doctrine bars youth minister's claim of sexual harassment based on statements regarding homosexuality); *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 332 (4th Cir. 1997) (refusing to "interpose the judiciary" into decisions "relating to how and by whom [churches] spread their message and specifically their

Congress, of course, recognized that important principle when it adopted an exception from Title VII to permit religious groups and schools to restrict hiring to members of their faith. *See* 42 U.S.C. 2000e-2(e)(2) (2000); *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (upholding exemption against Establishment Clause challenge). But these lower court decisions have held that Congress's exemption did not go far enough—that the First Amendment protects the right not only to restrict hiring to members of the church, but more generally to decide who is fit to carry out the church's religious mission.

Just as a church entity has a First Amendment right to decide who should carry out its religious mission, so too must it have the right to structure its relationship with its employees in conformity with church teachings.[14] If it chose to, a church entity could require its employees to promise to conform their conduct in all respects to church teachings. Surely the church can take the more "hands-off" approach of not funding conduct by its employees that violates those teachings. That is all that petitioners aim to do here.

Petitioners' employees have voluntarily elected to associate themselves with church entities, and petitioners have hired

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decision to select their outreach ministry through the granting or withholding of funds").

[14] *See* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1408-09 (1981); *cf. NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501-04, 507 (1979) (raising concerns as to the NLRB's exercise of jurisdiction over lay faculty members at Catholic high schools, but resolving the case by construing a statute so as to avoid "difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses").

them to advance the church's ministry.[15] There may be limits upon a church entity's right to conform its employee relations to church teachings. *See, e.g., United States v. Lee*, 455 U.S. 252 (1982) (private employer cannot avoid social security taxes based on religious objections). But neither *Smith* nor any other decision of this Court suggests that a church institution may be compelled to structure its employment relationship with its employees so as to sponsor private employee conduct that violates church teachings.

II. THE COURT OF APPEALS DECISION CREATES A CONFLICT OVER WHETHER LAWS THAT BURDEN RELIGIOUS FREEDOM MUST AT LEAST MEET RATIONAL BASIS SCRUTINY.

In general, "[l]iberty under law extends to the full range of conduct which the individual is free to pursue." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Accordingly, all laws implicating a liberty interest are subject to at least rational basis review. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 722, 728 (1997).

Smith did not contradict this principle. Rather, *Smith* merely rejected the application of the strict "compelling state interest" test to neutral laws of general applicability, stating: "we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order." 494 U.S. at 887-88 (emphasis omitted). Nothing in *Smith* implies that such laws should be free from rational basis review, which imposes no presumption of invalidity.

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[15] *See, e.g.*, Benedict XVI, Encyclical Letter *Deus Caritas Est* ¶ 33 (2005) ("The personnel of every Catholic charitable organization want to work with the Church and therefore with the Bishop, so that the love of God can spread throughout the world.")

The New York Court of Appeals, however, held that a law burdening religious freedom escapes all judicial scrutiny under the Free Exercise Clause, so long as the law is neutral and generally applicable. In its view, *Smith* created an "inflexible rule . . . that no person may complain of a burden on religious exercise that is imposed by a generally applicable, neutral statute." App. 9a. Having found the WHWA to be such a law,[16] the Court upheld it with no further review.

The Court of Appeals' interpretation of *Smith* on this point conflicts with every federal and state court of appeals decision on the question, all of which have held that even neutral laws of general applicability must meet rational basis review.[17] This conflict is of fundamental constitutional importance and is deserving of this Court's attention.

Unless rational basis review is required, petitioners face the deprivation of rights that have long been recognized as

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[16] That determination is itself questionable, given that the law contains a religious exemption and applies only to employers who choose to provide prescription drug coverage. *See infra* note 20.

[17] *See Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006) ("[A] law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge."); *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004) ("[I]f the zoning law only incidentally burdens the free exercise of religion, with the law being both neutral and generally applicable, it passes constitutional muster unless the law is not rationally related to a legitimate governmental interest."); *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir. 2002) ("Where the government seeks to enforce a law that is neutral and of general applicability, however, then it need only demonstrate a rational basis for its enforcement . . . ."); *Utah v. Green*, 99 P.3d 820, 829 (Utah 2004) ("Because Utah's bigamy statute is neutral and of general applicability, the State is not required to show that the interests it serves are compelling or that the statute is narrowly tailored in pursuit of those interests. Instead, the State need show only that the statute is rationally related to a legitimate government end.") (citations omitted).

fundamental, *see, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303, 307 (1940), without even the minimum level of constitutional protection that is extended to claimants asserting liberty interests that are unspecified in the Constitution and not deemed to be fundamental. The Court should clarify that *Smith* was not intended to countenance such a result.[18]

The law at issue here operates in a decidedly irrational manner. It was designed to advance women's health by expanding the provision of contraceptive coverage. But three features of the law, taken together, undermine that objective:

- The Act does not require any employer to provide prescription drug coverage at all.[19]

- Employees of exempt "religious employer[s]" who do not provide contraceptive coverage have access to contraceptive coverage through a low-cost state-mandated rider. *See supra* p. 5.

- Employees of non-exempt employers who do not provide prescription coverage are not eligible for the state-mandated contraceptive rider.

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[18] The rational basis standard is not without teeth. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating state constitutional amendment that precluded any legislative, executive, or judicial action to protect persons based on their homosexual orientation as having no rational relationship to any legitimate purpose); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (finding that requiring a special use permit for a group home for persons with mental retardation was not rationally related to any legitimate state interest).

[19] In this respect, the WHWA is fundamentally different from the laws that were described in *Smith* as "generally applicable." The State of New York has identified no conduct so harmful that no employer should be permitted to engage in it, and no benefit so important that all employers should be required to provide it. New York asserts no interest in mandating the uniform provision of prescription drug coverage or the uniform provision of contraceptive coverage.

In other words, far from requiring these petitioners (and other like-minded Church entities) to provide contraceptive coverage, the legislature has actually created an incentive for them to deny the prescription drug coverage that they would otherwise provide—for that is the only way that they can implement their religious belief that subsidizing contraceptive coverage is wrong. And far from guaranteeing contraceptive coverage of any kind to the employees of such entities, the legislature has denied those employees the contraceptive coverage guarantee that they would enjoy if petitioners were exempt.

In short, denying these employers an exemption from the contraceptive mandate undercuts the objective of the law. Exempting such entities, on the other hand, would advance the state's objective of "ensuring that the maximum number of women receive the best possible health care," App. 56a (Cardona, P.J., dissenting), because it would eliminate the incentive these entities have to withdraw prescription coverage altogether, while at the same time guaranteeing that their employees remain eligible for contraceptive coverage through the state-mandated rider.

Strict scrutiny is not required to see that the WHWA, as structured, unnecessarily infringes petitioners' free exercise rights. But something more than the Court of Appeals' total deference to legislative judgment is required.[20] This Court

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[20] In reviewing the statute under the New York Constitution, the Court granted "deference" to the legislature's presumed judgment that "to grant the broad religious exemption that plaintiffs seek would leave too many women outside the statute." App. 14a. But that deference overlooks the fact that *no one* would be left "outside" the statute's provisions for contraceptive coverage if the exemption were broadened: employees of exempt employers have access to contraceptive coverage through the contraceptive rider. On the other hand, denying these employers the exemption threatens to leave their employees without both the prescription coverage that they previously enjoyed and the state's desired contraceptive coverage. This is not a rationally conceived scheme.

should grant review to clarify that, at the very least, a law that places a "serious" burden on an institutional church's exercise of its religious freedom, App. 13a, must be rationally designed to promote its legitimate objective.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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APPENDIX A

COURT OF APPEALS OF NEW YORK

CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY *et al.*,
Appellants,

v.

GREGORY V. SERIO, as Superintendent of Insurance,
Respondent.

Oct. 19, 2006

OPINION OF THE COURT

R.S. SMITH, J.

Plaintiffs challenge the validity of legislation requiring health insurance policies that provide coverage for prescription drugs to include coverage for contraception. Plaintiffs assert that the provisions they challenge violate their rights under the religion clauses of the federal and state constitutions. We hold that the legislation, as applied to these plaintiffs, is valid.

The Challenged Legislation

In 2002, the Legislature enacted what is known as the "Women's Health and Wellness Act" (WHWA), mandating expanded health insurance coverage for a variety of services needed by women, including mammography, cervical cytology and bone density screening (L. 2002, ch. 554). At issue here are provisions of the WHWA requiring that an employer health insurance contract "which provides coverage for prescription drugs shall include coverage for the cost of contraceptive drugs or devices" (Insurance Law § 3221 [*l*][16]; § 4303[cc]).

The legislative history makes clear that the WHWA in general, and the provisions relating to contraception in particular, were designed to advance both women's health and the equal treatment of men and women. The Legislature was provided with extensive information showing the need for the legislation.

For example, the Legislature had before it a study showing that women paid 68% more than men in out-of-pocket expenses for health care, and that the cost of reproductive health services was a primary reason for the discrepancy. The American College of Obstetricians and Gynecologists advised the Legislature that better access to contraception would mean fewer abortions and unplanned pregnancies, and that the ability to time and space pregnancies was important to women's health. These conclusions are supported by studies contained in the record of this litigation, showing among other things that unintended pregnancies are often associated with delayed prenatal care; that such conditions as diabetes, hypertension, arthritis and coronary artery disease can be aggravated by pregnancy; that children born from unintended pregnancies are at risk of low birth weight and developmental problems; and that there are 3 million unintended pregnancies in the United States each year, of which approximately half end in abortion.

At the heart of this case is the statute's exemption for "religious employers." Such an employer may request an insurance contract "without coverage for . . . contraceptive methods that are contrary to the religious employer's relgious tenets" (Insurance Law § 3221[*l*][16][A]; § 4303[cc][1]). Where a religious employer invokes the exemption, the insurer must offer coverage for contraception to individual employees, who may purchase it at their own expense "at the prevailing small group community rate" (Insurance Law § 3221[*l*][16][B][i];

§ 4303[cc][2][A]). A "religious employer," as defined in the statute, is:

> "an entity for which each of the following is true:
>
> "(a) The inculcation of religious values is the purpose of the entity.
>
> "(b) The entity primarily employs persons who share the religious tenets of the entity.
>
> "(c) The entity serves primarily persons who share the religious tenets of the entity.
>
> "(d) The entity is a nonprofit organization as described in Section 6033(a)(2)(A)i or iii, of the Internal Revenue Code of 1986, as amended." (Insurance Law § 3221[*l*][16][A][1]; *see* § 4303[cc][1][A][i]-[iv].)

Plaintiffs say that this definition is unconstitutionally narrow.

The Legislature debated the scope of the "religious employer" exemption intensely before the WHWA was passed. A broader exemption was proposed, one that would have been available to any "group or entity . . . supervised or controlled by or in connection with a religious organization or denominational group or entity" (2001 N.Y. Senate Bill S 3, § 14). Supporters of this version of the exemption argued, as do plaintiffs here, that religious organizations should not be forced to violate the commands of their faith. Those favoring a narrower exemption asserted that the broader one would deprive tens of thousands of women employed by church-affiliated organizations of contraceptive coverage. Their view prevailed.

This Action

Plaintiffs are 10 faith-based social service organizations that object to the contraceptive coverage mandate in the WHWA. Eight plaintiffs are affiliated in some way with the

Roman Catholic Church: of these, three are large entities that provide a variety of social services, including immigrant resettlement programs, affordable housing programs, job development services, and domestic violence shelters; three primarily operate health care facilities, such as hospice centers, nursing homes and rehabilitative care facilities; and two operate schools. The other two plaintiffs are affiliated with the Baptist Bible Fellowship International: one of them offers a variety of social services to the public, including prison ministry, crisis pregnancy centers, job placement and homeless services; the other operates a K-12 school and provides daycare, preschool and youth services.

None of the plaintiffs qualifies as a "religious employer" under the WHWA. This is essentially because plaintiffs are not, or are not only, churches ministering to the faithful, but are providers of social and educational services. Each of the plaintiffs asserts that its purpose is not, or is not only, the inculcation of religious values; most of the plaintiffs acknowledge that they employ many people not of their faiths; all of the plaintiffs serve people not of their faiths; and only three of the plaintiffs are exempt from filing tax returns under Internal Revenue Code (26 USC) § 6033(a)(2)(A)(i) or (iii) (now § 6033[a][3][A][i] or [iii]), provisions applicable to churches and religious orders.

Plaintiffs believe contraception to be sinful, and assert that the challenged provisions of the WHWA compel them to violate their religious tenets by financing conduct that they condemn. The sincerity of their beliefs, and the centrality of those beliefs to their faiths, are not in dispute.

Contending that they are constitutionally entitled to be exempt from the provisions of the WHWA providing for coverage of contraceptives, plaintiffs brought this action against the Superintendent of Insurance, seeking a declaration that these portions of the WHWA are invalid, and an injunction against their enforcement. The complaint asserts broadly that

the challenged provisions are unconstitutional, but plaintiffs do not argue that they are unenforceable as to employers having no religious objections to contraception; in substance, plaintiffs challenge the legislation as applied to them. Supreme Court rejected the challenge, and granted summary judgment dismissing plaintiffs' complaint and declaring the legislation valid. The Appellate Division affirmed, with two Justices dissenting. We now affirm.

Discussion

Plaintiffs argue that the provisions of the WHWA requiring coverage of contraception violate the Free Exercise clauses of the New York and United States constitutions, and the Establishment Clause of the United States Constitution. Plaintiffs' strongest claim is under the New York Free Exercise Clause, but our analysis of that claim may be clearer if we discuss the federal Free Exercise Clause first.

I

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." By virtue of the Fourteenth Amendment, this provision is binding on the states as well as the federal government (*Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 [1940]).

The United States Supreme Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) bars plaintiffs' federal free exercise claim. In *Smith*, the Court interpreted its First Amendment decisions as holding "that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'" (*id.* at 879, 110 S.Ct. 1595, quoting *United States v. Lee*, 455

U.S. 252, 263 n. 3, 102 S.Ct. 1051, 71 L.Ed.2d 127 [1982, Stevens, J., concurring]). The Court held that where a prohibition on the exercise of religion "is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended" (494 U.S. at 878, 110 S.Ct. 1595).

By that test, the First Amendment has not been offended here. The burden on plaintiffs' religious exercise is the incidental result of a "neutral law of general applicability," one requiring health insurance policies that include coverage for prescription drugs to include coverage for contraception. A "neutral" law, the Supreme Court has explained, is one that does not "target[ ] religious beliefs as such" or have as its "object . . . to infringe upon or restrict practices because of their religious motivation" (*Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 113 S.Ct. 2217, 124 L.Ed.2d 472 [1993]). Religious beliefs were not the "target" of the WHWA, and it was plainly not that law's "object" to interfere with plaintiffs' or anyone's exercise of religion. Its object was to make broader health insurance coverage available to women and, by that means, both to improve women's health and to eliminate disparities between men and women in the cost of health care.

The fact that some religious organizations—in general, churches and religious orders that limit their activities to inculcating religious values in people of their own faith—are exempt from the WHWA's provisions on contraception does not, as plaintiffs claim, demonstrate that these provisions are not "neutral." The neutral purpose of the challenged portions of the WHWA—to make contraceptive coverage broadly available to New York women—is not altered because the Legislature chose to exempt some religious institutions and not others. To hold that any religious exemption that is not all-inclusive renders a statute non-neutral would be to discourage the enactment of any such exemptions—and thus

to restrict, rather than promote, freedom of religion. As the California Supreme Court explained, in a decision upholding a statute nearly identical to the WHWA:

> "The high court has never prohibited statutory references to religion for the purpose of accommodating religious practice. To the contrary, the court has repeatedly indicated that 'it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions'" (*Catholic Charities of Sacramento, Inc. v. Superior Ct.*, 32 Cal.4th 527, 551 [10 Cal.Rptr.3d 283], 85 P.3d 67, 83 [2004], quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335, 107 S.Ct. 2862, 97 L.Ed.2d 273 [1987]).

Nor can plaintiffs escape the force of the Supreme Court's decision in *Smith* by relying on the so-called "hybrid rights" exception. The notion of "hybrid rights" is derived from a dictum in which the *Smith* court distinguished certain of its previous cases by saying:

> "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the rights of parents . . . to direct the education of their children" (494 U.S. at 881, 110 S.Ct. 1595 [citations omitted]).

Assuming that the above language does create an exception to the general rule of *Smith*, the exception does not apply here, for this is not a case that involves free exercise "in conjunction with other constitutional protections." Plaintiffs claim that the challenged legislation interferes with their

rights of free speech and association, but the claim is insubstantial. The legislation does not interfere with plaintiffs' right to communicate, or to refrain from communicating, any message they like; nor does it compel them to associate, or prohibit them from associating, with anyone (*see Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. —, —, 126 S.Ct. 1297, 1309-1313, 164 L.Ed.2d 156 [2006]). It does burden their exercise of religion—but that alone, under *Smith*, cannot call the validity of a generally applicable and neutral statute into question.

Plaintiffs also suggest that an exception to the holding of *Smith* can be derived from the doctrine of church autonomy, which prevents states from interfering in matters of internal church governance (*Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich*, 426 U.S. 696, 709-710, 96 S.Ct. 2372, 49 L.Ed.2d 151 [1976]; *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church of North America*, 344 U.S. 94, 107–108, 73 S.Ct. 143, 97 L.Ed. 120 [1952]) or determining ecclesiastical questions (*Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 447, 89 S.Ct. 601, 21 L.Ed.2d 658 [1969]). But church autonomy is not at issue in this case. The Legislature has not attempted through the WHWA to "lend its power to one or the other side in controversies over religious authority or dogma" (*Employment Div. v. Smith*, 494 U.S. at 877, 110 S.Ct. 1595, 108 L.Ed.2d 876, citing *Presbyterian Church*, 393 U.S. at 445-452, 89 S.Ct. 601, *Kedroff*, 344 U.S. at 95-119, 73 S.Ct. 143, and *Serbian Eastern Orthodox Diocese*, 426 U.S. at 708-725, 96 S.Ct. 2372). The WHWA merely regulates one aspect of the relationship between plaintiffs and their employees.

Relying on the church autonomy cases, some lower federal courts have recognized a "ministerial exception" which exempts religious institutions from complying with title VII of the Civil Rights Act with respect to their ministers (*see e.g.*

Equal Empl. Opportunity Commn. v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795, 800 [4th Cir.2000]; *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 702-703 [7th Cir.2003]). But the ministerial exception has no bearing here; this case does not involve the right of a church to determine who it will employ to carry out its religious mission. The existence of a limited exemption for ministers from antidiscrimination laws does not translate into an absolute right for a religiously-affiliated employer to structure all aspects of its relationship with its employees in conformity with church teachings. The ministerial exception has been applied only to employment discrimination claims, and only to "ministers," broadly defined. This case involves neither.

In short, no exception to *Smith* is applicable in this case. *Smith* is an insuperable obstacle to plaintiffs' federal free exercise claim.

II

Article I, § 3 of the New York Constitution provides:

> "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."

In interpreting our Free Exercise Clause we have not applied, and we do not now adopt, the inflexible rule of *Smith* that no person may complain of a burden on religious exercise that is imposed by a generally applicable, neutral statute. Rather, we have held that when the State imposes "an incidental burden on the right to free exercise of religion" we must consider the interest advanced by the legislation that

imposes the burden, and that "[t]he respective interests must be balanced to determine whether the incidental burdening is justified" (*La Rocca v. Lane*, 37 N.Y.2d 575, 583, 376 N.Y.S.2d 93, 338 N.E.2d 606 [1975], citing *People v. Woodruff*, 26 A.D.2d 236, 238, 272 N.Y.S.2d 786 [1966], *affd.* 21 N.Y.2d 848, 288 N.Y.S.2d 1004, 236 N.E.2d 159 [1968]). We have never discussed, however, how the balancing is to be performed. Specifically, we have not said how much, if any, deference we will give to the judgments of the Legislature when the result of those judgments is to burden the exercise of religion. We now hold that substantial deference is due the Legislature, and that the party claiming an exemption bears the burden of showing that the challenged legislation, as applied to that party, is an unreasonable interference with religious freedom. This test, while more protective of religious exercise than the rule of *Smith*, is less so than the rule stated (though not always applied) in a number of other federal and state cases.

Before *Smith*, the leading United States Supreme Court case involving burdens imposed on religious exercise by generally applicable laws was *Sherbert v. Verner*, in which the Court held that justification of "any incidental burden on the free exercise of . . . religion" requires "a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate'" (374 U.S. 398, 403, 83 S.Ct. 1790, 10 L.Ed.2d 965 [1963], quoting *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 [1963]). This test has been characterized as "strict scrutiny" (*e.g., Catholic Charities of Sacramento*, 32 Cal.4th at 548, 10 Cal.Rptr.3d 283, 85 P.3d at 81), and it might be thought that few laws would pass the test. However, after upholding a claim of free exercise against a neutral and generally applicable statute in *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), the Supreme Court "rejected every claim for a free exercise exemption to come before it" for 18 years (McConnell, *The Origins and Historical Understanding of Free Exercise of*

Religion, 103 Harv. L. Rev. 1409, 1417 [1990]). During that period, many thought the Court's claim to be applying strict scrutiny—a claim finally abandoned when *Smith* was decided in 1990—less than convincing (*e.g., United States v. Lee*, 455 U.S. 252, 262-263, 102 S.Ct. 1051, 71 L.Ed.2d 127 [1982, Stevens, J., concurring]).

Since *Smith*, a number of state courts have interpreted their states' constitutions to call for the application of strict scrutiny (*e.g., Smith v. Fair Empl. & Hous. Commn.*, 12 Cal.4th 1143, 51 Cal.Rptr.2d 700, 913 P.2d 909 [1996]; *Swanner v. Anchorage Equal Rights Commn.*, 874 P.2d 274 [Alaska 1994]; *Attorney Gen. v. Desilets*, 418 Mass. 316, 636 N.E.2d 233 [1994]). Often, however, as in the California and Alaska cases just cited, the courts rejected claims to religious exemptions, and it is questionable whether the scrutiny applied by those courts is really as strict as their statement of the rule implies. Justice Brown of the California Supreme Court, dissenting in *Catholic Charities of Sacramento*, 32 Cal.4th at 583, 10 Cal. Rptr.3d 283, 85 P.3d at 105, remarked:

> "Strict scrutiny is not what it once was. Described in the past as 'strict in theory and fatal in fact' (Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection* (1972) 86 Harv. L.Rev. 1, 8), it has mellowed in recent decades
>
> . . . .
>
> "If recent precedent is any guide, a state's interest is compelling if the state says it is."

The apparent reluctance of some courts to pay more than lip service to "strict scrutiny" may be an implicit recognition of what we now explicitly decide: Strict scrutiny is not the right approach to constitutionally-based claims for religious exemptions. Where the State has not set out to burden religious exercise, but seeks only to advance, in a neutral way, a legitimate object of legislation, we do not read the New York

Free Exercise Clause to require the State to demonstrate a "compelling" interest in response to every claim by a religious believer to an exemption from the law; such a rule of constitutional law would give too little respect to legislative prerogatives, and would create too great an obstacle to efficient government. Rather, the principle stated by the United States Supreme Court in *Smith*—that citizens are not excused by the Free Exercise Clause from complying with generally applicable and neutral laws, even ones offensive to their religious tenets—should be the usual, though not the invariable, rule. The burden of showing that an interference with religious practice is unreasonable, and therefore requires an exemption from the statute, must be on the person claiming the exemption.

The burden, however, should not be impossible to overcome. As Professor (now Judge) McConnell has pointed out, a rule that the Constitution never requires a religious exemption from generally applicable laws could lead to results plainly inconsistent with basic ideas of religious freedom:

> "Under the no-exemptions view . . . religious believers and institutions cannot challenge facially neutral legislation, no matter what effect it may have on their ability or freedom to practice their religious faith. Thus, a requirement that all witnesses must testify to facts within their knowledge bearing on a criminal prosecution . . . if applied without exception, could abrogate the confidentiality of the confessional. Similarly, a general prohibition of alcohol consumption could make the Christian sacrament of communion illegal, uniform regulation of meat preparation could put kosher slaughterhouses out of business, and prohibitions of discrimination on the basis of sex or marital status could end the male celibate priesthood." (*The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. at 1418-1419.)

We find these hypothetical laws to be well beyond the bounds of constitutional acceptability. And we by no means exclude the possibility that, even in much less extreme cases, parties claiming an exemption from generally applicable and neutral laws will be able to show that the State has interfered unreasonably with their right to practice their religion. We conclude, however, that plaintiffs here fall short of making such a showing.

The burden the WHWA places on plaintiffs' religious practices is a serious one, but the WHWA does not literally *compel* them to purchase contraceptive coverage for their employees, in violation of their religious beliefs; it only requires that policies that provide prescription drug coverage include coverage for contraceptives. Plaintiffs are not required by law to purchase prescription drug coverage at all. They assert, unquestionably in good faith, that they feel obliged to do so because, as religious institutions, they must provide just wages and benefits to their employees. But it is surely not impossible, though it may be expensive or difficult, to compensate employees adequately without including prescription drugs in their group health care policies.

It is also important, in our view, that many of plaintiffs' employees do not share their religious beliefs. (Most of the plaintiffs allege that they hire many people of other faiths; no plaintiff has presented evidence that it does not do so.) The employment relationship is a frequent subject of legislation, and when a religious organization chooses to hire nonbelievers it must, at least to some degree, be prepared to accept neutral regulations imposed to protect those employees' legitimate interests in doing what their own beliefs permit. This would be a more difficult case if plaintiffs had chosen to hire only people who share their belief in the sinfulness of contraception.

Finally, we must weigh against plaintiffs' interest in adhering to the tenets of their faith the State's substantial interest in

fostering equality between the sexes, and in providing women with better health care. The Legislature had extensive evidence before it that the absence of contraceptive coverage for many women was seriously interfering with both of these important goals. The Legislature decided that to grant the broad religious exemption that plaintiffs seek would leave too many women outside the statute, a decision entitled to deference from the courts. Of course, the Legislature might well have made another choice, but we cannot say the choice the Legislature made has been shown to be an unreasonable interference with plaintiffs' exercise of their religion. The Legislature's choice is therefore not unconstitutional.

III

Plaintiffs' final claim is that the challenged sections of the WHWA violate the Establishment Clause of the Federal Constitution. We find this claim to be without merit.

The claim rests essentially on a misreading of a single United States Supreme Court case, *Larson v. Valente*, 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982). *Larson* held that the Establishment Clause was violated by a statute designed to exempt from certain regulatory requirements all religious faiths except a disfavored one, the Unification Church. The Court found the statute to violate the Establishment Clause's "clearest command": "that one religious denomination cannot be officially preferred over another" (*id.* at 244, 102 S.Ct. 1673). Nothing of the kind has happened in this case. It cannot be convincingly argued that the WHWA was designed to favor or disfavor Catholics, Baptists or any other religion. The statute is, as we explained above, generally applicable and neutral between religions.

Plaintiffs contend that the legislation is invalid under *Larson* because it distinguishes between religious organizations that are exempt from the contraception requirements and those that are not. But this kind of distinction—not

between denominations, but between religious organizations based on the nature of their activities—is not what *Larson* condemns. Plaintiffs' theory would call into question any limitations placed by the Legislature on the scope of any religious exemption—and thus would discourage the Legislature from creating any such exemptions at all. But, as we pointed out above, legislative accommodation to religious believers is a long-standing practice completely consistent with First Amendment principles. A legislative decision not to extend an accommodation to all kinds of religious organizations does not violate the Establishment Clause.

IV

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge KAYE and Judges CIPARICK, ROSENBLATT, GRAFFEO and READ concur.

Judge PIGOTT taking no part.

Order affirmed, with costs.

APPENDIX B

Remittitur

STATE OF NEW YORK
COURT OF APPEALS
HON JUDITH S. KAYE, *Chief Judge, presiding.*

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3 No. 110

CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY *et al.*,
Appellants,

v.

GREGORY V. SERIO, as Superintendent of Insurance,
Respondent.

The appellants in the above entitled appeal appeared by Tobin and Dempf, LLP; the respondent appeared by the Hon. Eliot Spitzer, Attorney General of the State of New York; and the amici curiae appeared by Mark D. Stern, Esq.; Elizabeth R. Benjamin, Esq. Julie Sternberg, Esq.; A. Stephen Hut, Jr., Esq.; Kevin M. Kearney, Esq.; Eve C. Gartner, Esq.; Jennifer Sandman, Esq. and Winston & Strawn, LLP.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Opinion by Judge R.S. Smith. Chief Judge Kaye and Judges Ciparick, Rosenblatt, Graffeo and Read concur. Judge Pigott took no part.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, Albany County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ Stuart M. Cohen
STUART M. COHEN, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, October 19, 2006

STATE OF NEW YORK
COURT OF APPEALS

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207-1095

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3 No. 110

CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY *et al.*,
Appellants,

v.

GREGORY V. SERIO, as Superintendent of Insurance,
Respondent.

DECISION October 19, 2006

Order affirmed, with costs.

Opinion by Judge R.S. Smith.

Chief Judge Kaye and Judges Ciparick, Rosenblatt, Graffeo and Read concur. Judge Pigott took no part

APPENDIX C

SUPREME COURT, APPELLATE DIVISION,
THIRD DEPARTMENT, NEW YORK.

CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY *et al.*,
Appellants,

v.

GREGORY V. SERIO, as Superintendent of Insurance,
Respondent.

Jan. 12, 2006

Before: CARDONA, P.J., MERCURE, PETERS, SPAIN and CARPINELLO, JJ.

MERCURE, J.

Appeal from an order of the Supreme Court (Lamont, J.), entered December 2, 2003 in Albany County, which, inter alia, granted defendant's cross motion for summary judgment dismissing the complaint.

This appeal presents constitutional and statutory questions flowing from a legislative enactment requiring employers that provide group insurance coverage for prescriptions to include prescription contraceptives in that coverage. The appeal is brought by a number of employers that are all religious organizations, but that do not qualify for the narrow statutory exemption for "religious employers."

I. Facts

In 2002, the Legislature enacted the Women's Health and Wellness Act (hereinafter WHWA), a comprehensive statutory initiative to improve group health insurance benefits for women's preventative health care. Provisions of the WHWA require group insurance policies and contracts to include

coverage for obstetric and gynecologic care, periodic mammography and cervical cytology screenings, and bone density exams, among other things (*see* L. 2002, ch. 554). The WHWA further requires that any group insurance that includes coverage for prescription drugs must also include a rider providing coverage for the cost of prescribed contraceptive drugs or devices (*see* Insurance Law § 3221[*l*] [16]; § 4303[cc]). In this action, plaintiffs challenge this "contraceptive mandate."

The WHWA provides two avenues by which an employer that offers its employees group health insurance may avoid providing coverage for prescription contraceptives. First, any employer that does not want to provide contraceptive coverage can offer its employees insurance that does not include prescription coverage at all (*see* Insurance Law § 3221 [*l*][16]; § 4303 [cc] [expressly requiring contraceptive coverage only in policies and contracts "which provide[ ] coverage for prescription drugs"]). Second, the WHWA includes an express exemption for "religious employers" if prescription contraceptive methods are "contrary to the religious employer's religious tenets" (Insurance Law § 3221[*l*][16][A]; § 4303[cc][1]). The exemption defines a "religious employer" as an entity that satisfies four criteria: (1) the inculcation of religious values is the purpose of the entity; (2) the entity primarily employs persons who share the religious tenets of the entity; (3) the entity serves primarily persons who share the religious tenets of the entity; and (4) the entity is a nonprofit organization as described in 26 USC § 6033(a)(2)(A)(i) or (iii) (Internal Revenue Code of 1986, as amended) (Insurance Law § 3221[*l*][16][A][1]; § 4303[cc][1] [A]) (hereinafter the exemption).

Plaintiffs are all faith-based entities that operate a broad array of ministries in areas of human services such as health care, education and job placement, counseling, and a wide

variety of services to the poor and needy. Each plaintiff is either operated in association with a diocese of the Roman Catholic Church or is a Baptist Church itself, but every plaintiff acknowledges that as a ministry, its primary purpose is not the inculcation of religious values. All of the plaintiffs minister to all people irrespective of faith. Four of the plaintiffs claim nonprofit status under 26 USC § 6033(a)(2)(A)(i) or (iii), but only with respect to their status as a church or religious order; no plaintiff claims such nonprofit status with respect to its ministry. While some of the plaintiffs objected to their insurance companies expanding their employees' prescription coverage to include contraceptives, all plaintiffs readily recognized that they do not satisfy the requirements for the exemption.

Plaintiffs assert that contraception is contrary to their religious tenets. They also assert that in accordance with religious teachings, they bear a moral obligation to offer their employees fair, adequate and just employment benefits, which they view as including prescription drug coverage. From plaintiffs' perspective, the WHWA leaves them with a Hobson's choice: either decline to provide coverage for the cost of all prescription drugs or extend coverage for contraceptives, neither of which they view as an acceptable option.

Plaintiffs commenced this action seeking declaratory and injunctive relief, and they moved for a preliminary injunction prohibiting enforcement of the WHWA. Defendant answered and cross-moved for summary judgment dismissing the complaint. Supreme Court granted defendant's motion and dismissed the complaint, and plaintiffs appeal.

Plaintiffs' constitutional challenges to the WHWA all fall within the religion clauses of the United States and New York Constitutions (U.S. Const. First Amend.; N.Y. Const., art. I, § 3). We first address their pure free exercise claims, which rely primarily on the state free exercise clause. Next we turn

to plaintiffs' "hybrid" claims (*see Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 881-882, 110 S.Ct. 1595, 108 L.Ed.2d 876 [1989]), in which they seek to link their free exercise claims with free speech claims. We then address plaintiffs' arguments founded on precepts of establishment clause jurisprudence and predicated upon a distinction that the exemption draws between religious entities' ecclesiastical and ministerial activities. These include contentions that the exemption is a prohibited gerrymander under *Larson v. Valente*, 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33 [1982], and that the WHWA constitutes an unconstitutional intrusion into church autonomy. Finally, plaintiffs contend that the WHWA violates various provisions of New York's Human Rights Law and Religious Corporations Law. Because we ultimately conclude that the WHWA and the religious employer exemption violate neither constitutional nor statutory provisions, we affirm.

II. Threshold Issues

Plaintiffs concede that the WHWA was duly enacted, and thus, their arguments addressed to the constitutionality of the WHWA must overcome certain presumptions and meet certain standards. "Legislative enactments enjoy a strong presumption of constitutionality" (*LaValle v. Hayden*, 98 N.Y.2d 155, 161, 746 N.Y.S.2d 125, 773 N.E.2d 490 [2002] [citations omitted]; *see Dalton v. Pataki*, 11 A.D.3d 62, 89, 780 N.Y.S.2d 47 [2004], *mod. on other grounds* 5 N.Y.3d 243, 802 N.Y.S.2d 72, 835 N.E.2d 1180 [2005], *cert. denied* --- U.S. ----, 126 S.Ct. 742, 163 L.Ed.2d 571 [2005]), and it is presumed that "the Legislature has investigated and found facts necessary to support the legislation" together with "the existence of a situation showing or indicating its need or desirability" (*Hotel Dorset Co. v. Trust for Cultural Resources of City of N.Y.*, 46 N.Y.2d 358, 370, 413 N.Y.S.2d 357, 385 N.E.2d 1284 [1978]; *see De Veau v. Braisted*, 5 N.Y.2d 236, 241-242, 183 N.Y.S.2d 793, 157 N.E.2d 165

[1959]). Accordingly, "parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity 'beyond a reasonable doubt'" (*LaValle v. Hayden, supra* at 161, 746 N.Y.S.2d 125, 773 N.E.2d 490, quoting *People v. Tichenor*, 89 N.Y.2d 769, 773, 658 N.Y.S.2d 233, 680 N.E.2d 606 [1997], *cert. denied* 522 U.S. 918, 118 S.Ct. 307, 139 L.Ed.2d 237 [1997]; *see Matter of Klein [Hartnett]*, 78 N.Y.2d 662, 666, 578 N.Y.S.2d 498, 585 N.E.2d 809 [1991], *cert. denied* 504 U.S. 912, 112 S.Ct. 1945, 118 L.Ed.2d 550 [1992]).

III. Constitutional Issues

Plaintiffs devote a significant portion of their brief to discussion of the religious beliefs that are affected by the WHWA and the undeniably substantial burden that the WHWA imposes upon those beliefs. The implication of this discussion is that religious beliefs that are deeply and strongly held are, by virtue of U.S. Constitution First Amendment and N.Y. Constitution, article I, § 3, impenetrable by civil law. But that simply is not so. Religion and religious institutions exist within a civil society, and notwithstanding the constitutional protection accorded religious freedoms, conflicts inevitably arise between religious adherents and government when the latter exercises its obligation to order a civil society (*see Lemon v. Kurtzman*, 403 U.S. 602, 614, 91 S.Ct. 2105, 29 L.Ed.2d 745 [1971] ["total separation (between church and state) is not possible in an absolute sense"]; *Walz v. Tax Commn. of City of N.Y.*, 397 U.S. 664, 670, 90 S.Ct. 1409, 25 L.Ed.2d 697 [1970] ["the very existence of the Religion Clauses is an involvement of sorts-one that seeks to mark boundaries to avoid excessive entanglement"]). Such conflicts are resolved by review of the claimed constitutional right and the allegedly unconstitutional governmental action within the established framework of constitutional analysis. Ultimately, the question is not whether the civil law has an effect upon religion, but whether that effect violates the

boundaries established by constitutional jurisprudence (*see Boy Scouts of Am. v. Dale*, 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 [2000] [association]; *Employment Div., Dept. of Human Resources of Oregon v. Smith, supra* [free exercise]; *Spence v. Washington*, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 [1974] [free speech]; *Lemon v. Kurtzman, supra* [establishment]). Here, while we recognize the burdens imposed upon plaintiffs' sincerely held religious beliefs by the WHWA's contraceptive coverage mandate,[1] and the dilemma in which plaintiffs find themselves, our analysis leads us to the conclusion that the challenged provisions of the WHWA are not unconstitutional.[2]

A. Free Exercise

The Free Exercise Clause of the First Amendment, which applies to the states by virtue of the Fourteenth Amendment (*see Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 [1940]), guarantees that government

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[1] We decline plaintiffs' invitation to reverse Supreme Court's order on the ground that triable issues of material fact exist with respect to the burdens imposed upon plaintiffs' religious beliefs-the record adequately supports the point without contradiction.

[2] In 1999, the California Legislature enacted the Women's Contraception Equity Act (hereinafter WCEA), which required certain group policies that offered prescription coverage to include coverage for prescription contraceptives (Cal. Health and Safety Code § 1367.25; Cal. Insurance Code § 10123.196). The WCEA's four-pronged definition of a "religious employer" was adopted verbatim by the New York Legislature in the WHWA (*see* Insurance Law § 3221[*l*][16][A][1]; § 4303[cc][1] [A]; Cal. Health and Safety Code § 1367.25[b][1]; Cal. Insurance Code § 10123.196[d][1]). The constitutionality of the WCEA has been upheld by the California Supreme Court in *Catholic Charities of Sacramento v. Superior Court of Sacramento County*, 32 Cal.4th 527, 10 Cal.Rptr.3d 283, 85 P.3d 67 [2004], *cert. denied* 543 U.S. 816, 125 S.Ct. 53, 160 L.Ed.2d 22 [2004], a decision which we find highly instructive on many points in this appeal.

shall make no law "prohibiting the free exercise" of religion. New York's Bill of Rights provides:

> "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state" (N.Y. Const., art. I, § 3).

Although invoking the First Amendment, plaintiffs do not analyze or expressly argue a Federal Free Exercise Clause claim; rather, they rely heavily upon the state constitutional provision, which, they argue, provides broader protection than does the Federal Free Exercise Clause. Our analysis must nevertheless begin with review of plaintiffs' claim under the First Amendment of the U.S. Constitution.

1. First Amendment Free Exercise Clause

While the United States Supreme Court previously applied strict scrutiny-requiring a state to show a compelling interest justifying a burden on an individual's freedom to exercise religious beliefs (*see Sherbert v. Verner*, 374 U.S. 398, 403, 83 S.Ct. 1790, 10 L.Ed.2d 965 [1963])-there is little dispute that the current analysis for violations of the Free Exercise Clause of the First Amendment is framed in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595 [1989], *supra*. "[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice" (*Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 [1993]). Only a law that does not meet the interrelated requirements of

neutrality and general applicability will be subject to strict scrutiny (*id.* at 531-532, 546, 113 S.Ct. 2217). "*[I]f the* object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral" (*id.* at 533, 113 S.Ct. 2217). Similarly, a law is not generally applicable if it "in a selective manner impose[s] burdens only on conduct motivated by religious belief" (*id.* at 543, 113 S.Ct. 2217).

The WHWA and its provisions apply to every group health insurance policy and contract delivered or issued for delivery in New York (*see* Insurance Law § 3221[a]; § 4303[a]) and, accordingly, every employer in the state that offers group health insurance is subject to the statute. The WHWA does not selectively impose any burden on conduct motivated by religious belief and is therefore generally applicable (*see Employment Div., Dept. of Human Resources of Oregon v. Smith, supra* at 879-880, 110 S.Ct. 1595; *see also United States v. Lee*, 455 U.S. 252, 258, 102 S.Ct. 1051, 71 L.Ed.2d 127 [1982]). The inclusion of an exemption for a narrow class of employers, which exempts them with respect to only one aspect of the mandated coverage, does not undermine a conclusion that the law is generally applicable (*see United States v. Lee, supra* at 260-261, 102 S.Ct. 1051).

The object of a law, i.e., its neutrality (*see Church of Lukumi Babalu Aye v. City of Hialeah, supra* at 533, 113 S.Ct. 2217), is evaluated both facially and by the effect of the law in its operation (*see id.* at 533-535, 113 S.Ct. 2217; *Grumet v. Pataki*, 93 N.Y.2d 677, 688-689, 697 N.Y.S.2d 846, 720 N.E.2d 66 [1999], *cert. denied* 528 U.S. 946, 120 S.Ct. 363, 145 L.Ed.2d 284 [1999], citing *Grumet v. Cuomo*, 90 N.Y.2d 57, 70, 659 N.Y.S.2d 173, 681 N.E.2d 340 [1997]). Neutrality and general applicability are intertwined (*see Church of Lukumi Babalu Aye v. City of Hialeah, supra* at 531, 113 S.Ct. 2217) and here, the analysis of the WHWA's neutrality does not depart from the analysis of its

general applicability. The WHWA as a whole is facially neutral, and its object—to increase women's access to health care—does not target religious practices (*compare id.* [object of the enactments was to prevent one religious group from performing religious rituals]). To the extent that plaintiffs' arguments that the WHWA is not neutral derive from the exemption for religious employers, they are inapt in the analysis of plaintiffs' free exercise claims, and are properly analyzed under First Amendment Establishment Clause principles (*see e.g. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334-336, 107 S.Ct. 2862, 97 L.Ed.2d 273 [1987]; *Catholic Charities of Sacramento v. Superior Court of Sacramento County*, 32 Cal.4th 527, 551, 10 Cal.Rptr.3d 283, 85 P.3d 67, 83 [2004], *cert. denied* 543 U.S. 816, 125 S.Ct. 53, 160 L.Ed.2d 22 [2004]; *see also United States v. Lee, supra* at 260-261, 102 S.Ct. 1051 [plaintiffs' rights deriving from the Free Exercise Clause are not implicated by the inclusion of an exemption that accommodates some religious adherents other than plaintiffs]).

In sum, the WHWA easily satisfies the test of *Smith*, and thus, while it incidentally imposes a burden on plaintiffs' free exercise rights, we find that it does not violate the Free Exercise Clause of the First Amendment.

2. NY Constitution

Plaintiffs argue that N.Y. Constitution, article I, § 3 affords greater protection than under the Federal Free Exercise Clause. To be sure, the language of the two constitutional clauses is different-the First Amendment broadly and summarily protects "the free exercise" of religion, while New York's Free Exercise Clause protects the "free exercise and enjoyment of religious profession and worship," further stating that "the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state"

(N.Y. Const., art. I, § 3). Plaintiffs contend that a "compelling interest" test should be employed to review state free exercise claims. They further assert that the language of the State Free Exercise Clause expressly limits the state interests that may intrude upon free exercise of religion to those interests which protect against a substantial threat to the peace and safety of the state.

In reviewing state free exercise claims, the Court of Appeals has applied a test that balances "'the interest of the individual right of religious worship against the interest of the [s]tate which is sought to be enforced'" (*People ex rel. DeMauro v. Gavin*, 92 N.Y.2d 963, 964, 683 N.Y.S.2d 750, 706 N.E.2d 738 [1998], quoting *People v. Woodruff*, 26 A.D.2d 236, 238, 272 N.Y.S.2d 786 [1966], *affd.* 21 N.Y.2d 848, 288 N.Y.S.2d 1004, 236 N.E.2d 159 [1968]). Each time the issue has come before the Court of Appeals, it has applied this balancing test (*see People ex rel. DeMauro v. Gavin, supra; La Rocca v. Lane*, 37 N.Y.2d 575, 583, 376 N.Y.S.2d 93, 338 N.E.2d 606 [1975], *cert. denied* 424 U.S. 968, 96 S.Ct. 1464, 47 L.Ed.2d 734 [1976]; *People v. Woodruff, supra*). Indeed, in *La Rocca v. Lane, supra*, the Court of Appeals expressly considered the "compelling interest" standard set forth in *Sherbert v. Verner*, 374 U.S. 398, 403, 83 S.Ct. 1790 [1963], *supra*, but applied the balancing test previously stated by the Court in *People v. Woodruff, supra; cf. Matter of Fosmire v. Nicoleau*, 75 N.Y.2d 218, 234, 551 N.Y.S.2d 876, 551 N.E.2d 77 [1990] [Simons, J., concurring, asserting that the Court should consider the respondents' federal and state constitutional free exercise claims, and should apply strict scrutiny thereto]. Only in the context of prison administration has the Court of Appeals articulated a quantum required of the state's interest, and then it has required that the state show only a "legitimate" institutional interest to outweigh state constitutional free exercise claims (*see Matter of Rivera v. Smith,* 63 N.Y.2d 501, 512, 483 N.Y.S.2d 187, 472 N.E.2d 1015 [1984]; *see also* Correction Law § 610;

Matter of Brown v. McGinnis, 10 N.Y.2d 531, 535-536, 225 N.Y.S.2d 497, 180 N.E.2d 791 [1961]; *Matter of Shahid v. Coughlin*, 83 A.D.2d 8, 11, 444 N.Y.S.2d 264 [1981], *affd.* 56 N.Y.2d 987, 453 N.Y.S.2d 682, 439 N.E.2d 397 [1982]). Thus, we conclude that defendant need not show a "compelling" state interest, and that we should apply a balancing test to plaintiffs' state constitutional free exercise claims.

The balancing test is a two step process: "first, a determination whether a restriction will be . . . imposed on [plaintiffs'] freedom of worship; and secondly, a determination whether the presence of a restriction is justified, after consideration of the social and constitutional values involved" (*People v. Woodruff, supra* at 238, 272 N.Y.S.2d 786).

We begin this process with the recognition that plaintiffs' religious beliefs are sincerely held, and that in their view, their religious dilemma can be resolved only by a finding that the WHWA is unconstitutional because the exemption is not broad enough to include them.[3] We do not question the veracity or strength of plaintiffs' convictions (*see Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 887, 110 S.Ct. 1595 [1989], *supra; United States v. Lee*, 455 U.S. 252, 257, 102 S.Ct. 1051 [1982], *supra*), and we accept their assertions that the qualified mandated coverage for prescription contraceptives burdens their free exercise rights.

Turning to the social issues involved in this constitutional dispute, we reject plaintiffs' constricted reading of N.Y. Con-

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[3] We note that plaintiffs do not seek a "constitutionally required exemption" from the WHWA (*United States v. Lee*, 455 U.S. 252, 256, 102 S.Ct. 1051 [1982], *supra*), but rather seek a judgment declaring that the "contraceptive mandate" provisions (*see Insurance Law* § 3221[*l*][16]; § 4303[cc]), and "those portions of [*Insurance Law* §] 3221(k)(13) and [§] 4303(bb) dealing with contraceptive drugs and devices" are unconstitutional and unenforceable.

stitution, article I, § 3 which, they contend, expressly limits the scope of the state interest to only those matters that are narrowly in pursuit of "peace or safety or . . . limiting licentiousness." While plaintiffs generally argue the limitations purportedly imposed by these terms, their arguments do not address the fact that the interests of the state in peace and safety extend far beyond protection of the citizenry from disorderly or criminal behavior, and include such interests as medical care and gender equality (*see* Executive Law § 290[3] [declaring that lack of equal opportunity because of, among other things, discrimination and health care, "threatens the peace, order, health, safety and general welfare of the state and its inhabitants"]). The importance of the conjoined interests of gender equality and health care-which the WHWA seeks to address-is well documented.[4]

Nor have plaintiffs rebutted the presumption that the Legislature conducted adequate fact-finding to support its enactment of the WHWA (*see Hotel Dorset Co. v. Trust for Cultural Resources of City of N.Y.*, 46 N.Y.2d 358, 413

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[4] *See* N.Y. Constitution, article XVII, § 3 ("The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made . . . as the legislature shall from time to time determine"); Executive Law § 296(1)(a) ("It shall be an unlawful discriminatory practice . . . [f]or an employer . . . because of the . . . sex . . . of any individual . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment."); *see also Catholic Charities of Sacramento v. Superior Court of Sacramento County*, 32 Cal.4th 527, 564, 10 Cal.Rptr.3d 283, 85 P.3d 67 [2004], *supra* (finding that the WCEA serves the compelling state interest of eliminating gender discrimination). One commentator has noted that legislative initiatives related to mandatory provision of contraception coverage were motivated, in part, by the availability of group health insurance coverage for the male impotency medication Viagra shortly after it received FDA approval (*see* Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Coverage Statutes to Religious Employers*, 28 Harv. J. L. & Pub. Pol'y 741, 770 [2005]).

N.Y.S.2d 357, 385 N.E.2d 1284 [1978], *supra*). Indeed, the record contains evidence that out-of-pocket costs for insured women were 68% higher than such costs for insured men, and that male-related medical care was more accessible through insurance than was female-related care, supporting the Legislature's conclusion that group health insurance coverage in this state was inequitable as between men and women. The record also bears evidence that unplanned pregnancies can have substantial negative impact on the physical, emotional and economic health of women and children, and that increased access to prescription contraceptives would address those issues. We note that the affidavit of physician Hanna Klaus, submitted in support of plaintiffs' request for a preliminary injunction, while commenting upon aspects of the use of artificial contraceptives, does not address the adequacy of the Legislature's fact-finding process.

Having defined "the social and constitutional values involved" (*People v. Woodruff*, 26 A.D.2d 236, 238, 272 N.Y.S.2d 786 [1966], *supra*), we proceed to balance them. We attribute substantial weight to each of the state's interests-the social value of gender equity and the health and related interests of thousands of women and children-and acknowledge that they are enhanced by their conjoined status in the WHWA. We note that despite substantial efforts over a number of years, the Legislature was unable to pass the WHWA with the broader "conscience clause" desired by plaintiffs and implicitly urged by the dissent, and thus, absent the narrow "religious employer" exemption that does not include plaintiffs, the state interests satisfied by the WHWA would never have been met.[5]

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[5] In any event, given the lack of evidence in the record as to how plaintiffs are funded, it is unclear that any plaintiff herein would qualify for the broader exemption adopted in states such as Connecticut and Massachusetts. That exemption does not apply to organizations that normally receive more than 25% of their support from governmental sources.

On the other side of the scale, we attribute great weight to plaintiffs' free exercise rights and the state constitutional values inherent therein. However, it cannot be overlooked that plaintiffs, in their capacities as ministries, employ people who do not share their religious beliefs. While plaintiffs' free exercise rights are not diminished by this fact, the rights—including the paramount right of personal health—of many employees who do not share plaintiffs' views on contraceptives would be subordinated to plaintiffs' right to freely exercise their beliefs. Moreover, at least some of the plaintiffs could avoid the contraceptive coverage mandate by withholding all prescription coverage, yet meet their religious obligation to provide their employees with prescription medications through self insurance or other means (*see* Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Coverage Statutes to Religious Employers*, 28 Harv. J. L. & Pub. Pol'y 741, 774-775 [2005]).

Reasonable minds may differ with respect to whether the WHWA and its exemption take the best path toward meeting the Legislature's stated goals, and whether the benefits of the statute will be outweighed by the potential for harm to women if employers choose not to provide prescription coverage. However, and as noted above, in the absence of a showing to the contrary, we must presume that the Legislature conducted adequate fact-finding to satisfy itself that sufficient numbers of women would be benefitted by the WHWA even if significant numbers of employers—both religious and nonreligious-chose to opt out of prescription coverage altogether (*see Hotel Dorset Co. v. Trust for Cultural Resources of City of N.Y.*, 46 N.Y.2d 358, 413 N.Y.S.2d 357, 385 N.E.2d 1284 [1978], *supra; De Veau v. Braisted*, 5 N.Y.2d 236, 241-242, 183 N.Y.S.2d 793, 157 N.E.2d 165 [1959], *supra*). Moreover, "[i]t is not the role of the courts to pass upon the wisdom of the Legislature's policy choice, even though there may be differences of views about

the decision" reflected in the legislation (*Hope v. Perales*, 83 N.Y.2d 563, 575, 611 N.Y.S.2d 811, 634 N.E.2d 183 [1994]; *see Dalton v. Pataki*, 5 N.Y.3d 243, 269, 802 N.Y.S.2d 72, 835 N.E.2d 1180 [2005], *supra*). In reviewing the Legislature's public policy determinations, a court "must operate on the rule that it may not substitute its judgment for that of the body which made the decision. Judges, however much they might disagree with the wisdom of the act under review, are not free to invalidate it on that ground" (*Hotel Dorset Co. v. Trust for Cultural Resources of City of N.Y., supra* at 370, 413 N.Y.S.2d 357, 385 N.E.2d 1284). All things considered, and limiting our review to the appropriate judicial inquiry, we conclude that the balance tips away from plaintiffs' right to free exercise and in favor of the WHWA, and therefore find that the WHWA does not violate N.Y. Constitution, article I, § 3.

B. "Hybrid" Rights

Relying on dictum in *Smith*, plaintiffs contend that even if their free exercise claims fail, the combination of those rights with another First Amendment right constitutes a meritorious "hybrid" constitutional claim (*see Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 881-882, 110 S.Ct. 1595 [1989], *supra*). They invoke the rights of expressive association and conduct as speech—both rights deriving from the Free Speech Clause—in support of these claims. Because we conclude that neither of these free speech claims is independently meritorious, plaintiffs' "hybrid" claim necessarily fails.

1. Expressive Association

Plaintiffs rely primarily upon *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 120 S.Ct. 2446 [2000], *supra* and *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 [1995], and they offer numerous quotes from the opinions in those cases about

the unconstitutional effect of requiring an entity to send a message that is inimical to or inconsistent with the entity's values or beliefs. However, although plaintiffs acknowledge that the existence of an "expressive association" of people or groups of people is an element of a First Amendment claim to associational expression (*see Forum for Academic & Institutional Rights v. Rumsfeld*, 390 F.3d 219, 231, 257-258 [3d Cir.2004], *cert. granted* 544 U.S. 1017, 125 S.Ct. 1977, 161 L.Ed.2d 855 [2005]; *see generally Roberts v. United States Jaycees*, 468 U.S. 609, 617-618, 104 S.Ct. 3244, 82 L.Ed.2d 462 [1984] [discussing the types of associational activities implicated in a challenge to an organization's exclusion of women]; *Boy Scouts of Am. v. Dale, supra* [scouting association opposed New Jersey Law Against Discrimination which mandated inclusion of a homosexual assistant scoutmaster]; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, supra* [private organization that sponsored St. Patrick's Day parade challenged Massachusetts public accommodation law that required inclusion of gay, lesbian and bisexual group]), their complaint does not allege, nor do they persuasively argue, that the WHWA requires plaintiffs to join an expressive association. Plaintiffs' contention that they are being "grouped" in some inchoate manner with employers who provide contraceptive coverage does not demonstrate an affiliation that is sufficient to support an expressive association claim. Because plaintiffs' expressive association claim lacks this necessary factual predicate, their assertions that the WHWA violates the First Amendment in this regard are wholly without merit.

2. Conduct as Protected Speech

Plaintiffs argue that the WHWA's contraceptive coverage requirement violates their First Amendment right to free speech because it compels them to engage in conduct that communicates a pro-contraceptive message that is contrary to their sincerely held anti-contraceptive beliefs.

As a general principle, conduct without the use of express language may be entitled to protection under the Free Speech Clause of the First Amendment (*see Spence v. Washington*, 418 U.S. 405, 94 S.Ct. 2727 [1974], *supra* [display of American flag with peace symbol attached to it]; *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 [1969] [students wearing black armbands to protest United States policy in Vietnam]; *Brown v. Louisiana*, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 [1966] ["sit-in" by African Americans in "whites only" library to protest segregation]). However, plaintiffs' invocation of the protections of the Free Speech Clause of the First Amendment imposes upon them the burden of establishing that the conduct upon which their free speech claim rests-here, the provision of group insurance coverage for prescription contraceptives-is expressive conduct embraced by the First Amendment (*see Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n. 5, 104 S.Ct. 3065, 82 L.Ed.2d 221 [1984] [stating that "[t]o hold otherwise would be to create a rule that all conduct is presumptively expressive"]). The claimed expressive conduct must be subjected to a two part test: first, does the speaker have an "intent to convey a particularized message," and second, whether "the likelihood was great that the message would be understood" by those to whom it was conveyed (*Spence v. Washington, supra* at 410-411, 94 S.Ct. 2727; *see Clark v. Community for Creative Non-Violence, supra* at 293, 104 S.Ct. 3065 [majority], 305 [Marshall, J. dissenting]). Moreover, the intent of the actor and the comprehension of the audience must be viewed "within the factual context and environment" of the conduct (*Clark v. Community for Creative Non-Violence, supra* at 294, 305-306, 104 S.Ct. 3065; *see Spence v. Washington, supra* at 410, 94 S.Ct. 2727).

Clearly, plaintiffs do not intend their provision of contraceptive coverage to convey a particularized message *endors-*

ing contraceptive use.[6] Accepting that plaintiffs' conduct does convey a message about contraceptives, we do not agree with plaintiffs' assertion that they will be perceived as endorsing contraceptives, especially in light of the context in which plaintiffs are obligated to provide contraceptive coverage. Plaintiffs, like all others in the state who provide group health insurance for prescription coverage, must comply with a statutory mandate. Given plaintiffs' well-known religious beliefs regarding contraception, we cannot conclude that there is a "great likelihood" that plaintiffs' provision of contraceptive coverage to its employees would be perceived as anything more than compliance under protest with a statutory mandate that is generally applicable to all employers offering group health insurance coverage, rather than conduct undertaken for an expressive purpose.

While we certainly accept the fundamental principle underlying plaintiffs' "conduct as speech" argument—that the right to freedom of speech necessarily incorporates the right to refrain from speaking (*see Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 [1977])—the dissent foregoes the two-step analysis that is required to determine, in the first instance, whether the conduct sought to be protected is, in fact, constitutionally protected speech (*see Clark v. Community for Creative Non-Violence, supra* at 293, 104 S.Ct. 3065; *Spence v. Washington, supra* at 410-411, 94 S.Ct. 2727; *compare Wooley v. Maynard, supra* at 713-715, 97 S.Ct. 1428 [predating *Clark*, and involving the imposed display of express language-a government slogan-on private property]). Moreover, the dissent's conclusion that the WHWA requires offensive speech on pain of penalty rests on conjecture that plaintiffs may suffer disadvantage in the

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[6] We note that the argument that plaintiffs' conduct is constitutionally-protected speech is not enhanced because religion is involved. Rather, the "religious" aspects of the conduct fall within the ambit of the Free Exercise Clause.

competitive employment marketplace, and lacks the support of an objective and severe sanction (*compare Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234, 97 S.Ct. 1782, 52 L.Ed.2d 261 [1977] [loss of public employment]; *Wooley v. Maynard, supra* at 708, 97 S.Ct. 1428 [criminal penalties]; *Miami Herald Publ. Co. v. Tornillo*, 418 U.S. 241, 244, 94 S.Ct. 2831, 41 L.Ed.2d 730 [1974] [criminal penalties]). Because plaintiffs have not met their burden of establishing that the conduct imposed upon them is constitutionally-protected speech, this free speech claim fails.

Finding that plaintiffs have adequately stated a hybrid free exercise/free speech claim, the dissent proceeds to apply strict scrutiny to the WHWA, and concludes that the state's asserted interests in gender equity and women's healthcare are undermined, and that the statute is not narrowly tailored because it encourages nonexempt religious organizations to opt out of providing prescription coverage. While we disagree with the determination to apply strict scrutiny in the first instance, we note that this analysis fails to acknowledge the compelling state interests at issue, and ignores the unrebutted presumption that the Legislature conducted adequate fact-finding with respect to the effect of the opt-out provision.

C. Establishment Clause

Plaintiffs assert challenges to the contraceptive coverage mandate under the Establishment Clause of the First Amendment.[7] At the outset, a distinction must be drawn between

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[7] Although the complaint in this action states separate causes of action under the N.Y. Constitution, plaintiffs' brief to this Court does not argue any independent state Establishment Clause right, and thus, we will consider plaintiffs' Establishment Clause claims only under the First Amendment. We note that like the Free Exercise Clause of the First Amendment, the Establishment Clause is applicable to the states by virtue of the Fourteenth Amendment (*Roemer v. Board of Pub. Works of Maryland*, 426 U.S. 736, 743 n. 6, 96 S.Ct. 2337, 49 L.Ed.2d 179 [1976]). In the absence of an argument addressed specifically to the "preference

plaintiffs' facial challenges to the WHWA and challenges to the statute as applied, because the former are properly before us; the latter are not (*see generally Bowen v. Kendrick*, 487 U.S. 589, 600-602, 108 S.Ct. 2562, 101 L.Ed.2d 520 [1988]). Plaintiffs devote substantial attention to the entanglement problems they anticipate will arise when a religious entity's claim to the exemption is disputed or reviewed. But in this case, no plaintiff claimed the exemption, nor has any challenged a determination that they were not entitled to it, and thus, no entanglement issues are before this Court (*see Catholic Charities of Sacramento v. Superior Court of Sacramento County*, 32 Cal.4th 527, 546-547, 10 Cal.Rptr.3d 283, 85 P.3d 67 [2004], *supra*).

Plaintiffs' facial challenges to the exemption from the contraceptive coverage mandate are articulated in the following manner. They contend that courts may not draw a distinction between religious and secular activity, and they argue that the exemption is a prohibited gerrymander, in violation of principles set forth in *Larson v. Valente*, 456 U.S. 228, 102 S.Ct. 1673 [1982], *supra*. They also assert that the statute offends the doctrine of "church autonomy."

1. Lemon v. Kurtzman (403 U.S. 602 [1971])

Plaintiffs have not articulated these discrete and narrow arguments within the well established *Lemon* test that is applied to Establishment Clause claims, as we must.[8] "First,

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clause" of the N.Y. Constitution, we deem such a claim to be abandoned (*see Matter of Schulz v. New York State Legislature*, 5 A.D.3d 885, 888 n. 2, 773 N.Y.S.2d 174 [2004], *lv. dismissed* 2 N.Y.3d 793, 781 N.Y.S.2d 291, 814 N.E.2d 463 [2004], *lv. denied* 3 N.Y.3d 606, 785 N.Y.S.2d 23, 818 N.E.2d 665 [2004]).

[8] While the *Lemon* test has been slightly modified in the context of governmental aid to religious schools (*see Mitchell v. Helms*, 530 U.S. 793, 807-808, 120 S.Ct. 2530, 147 L.Ed.2d 660 [2000]), the test remains applicable to review Establishment Clause issues in other factual contexts (*see Ehlers-Renzi v. Connelly School of the Holy Child*, 224 F.3d 283, 288

the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion'" (*Lemon v. Kurtzman*, 403 U.S. 602, 612-613, 91 S.Ct. 2105 [1971], *supra* [citations omitted]; *see Bowen v. Kendrick, supra* at 602, 108 S.Ct. 2562). The first prong of the *Lemon* analysis is not implicated by plaintiffs' arguments. Rather, plaintiffs' arguments are addressed to the second and third prongs of the *Lemon* analysis.

Manifestly, under *Lemon's* second prong, the principal or primary effect of the WHWA as a whole is not the advancement or inhibition of religion, and plaintiffs do not contend otherwise; rather, they focus their arguments on the "religious employer" exemption and their view that it favors some religious groups over others. Drawing a distinction between religious and secular activities or purposes does not, on its face, offend the Establishment Clause (*see e.g. Bowen v. Kendrick, supra* at 609, 108 S.Ct. 2562 [discussing *Bradfield v. Roberts*, 175 U.S. 291, 20 S.Ct. 121, 44 L.Ed. 168 (1899)]; *Roemer v. Board of Pub. Works of Maryland*, 426 U.S. 736, 746-747, 96 S.Ct. 2337, 49 L.Ed.2d 179 [1976]). And the Establishment Clause is not necessarily offended when such a distinction provides the basis for an exemption from an otherwise generally applicable law (*see Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334-335, 107 S.Ct. 2862 [1987], *supra; Catholic Charities of Sacramento v. Superior Court of Sacramento County, supra*). Plaintiffs generally contend—and the dissent agrees—that the exemption favors religious worship over religious-based ministry, and that it discriminates between religious institutions that are devoted solely to ecclesiastical purposes and religious insti-

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[4th Cir.2000], *cert. denied* 531 U.S. 1192, 121 S.Ct. 1192, 149 L.Ed.2d 107 [2001]).

tutions whose ministries are a part of the institution. While plaintiffs' objection is understandable, they do not explain how this distinction advances or inhibits religion within the meaning of *Lemon's* second prong.

Rather, the distinction between secular and sectarian generally gives rise to Establishment Clause problems within the confines of the third prong of the *Lemon* test. That is, excessive entanglement between church and state may occur when the government performs an individualized inquiry into whether a particular entity's activities are religious or secular, "because [the inquiry] involves [government] officials in the definition of what is religious" (*Espinosa v. Rusk*, 634 F.2d 477, 481 [2d Cir.1980], *affd.* 456 U.S. 951, 102 S.Ct. 2025, 72 L.Ed.2d 477 [1982]; *see Holy Spirit Assn. for Unification of World Christianity v. Tax Commn. of City of N.Y.*, 55 N.Y.2d 512, 450 N.Y.S.2d 292, 435 N.E.2d 662 [1982]; *University of Great Falls v. National Labor Relations Bd.*, 278 F.3d 1335, 1342 [D.C.Cir.2002]).

The exemption in the WHWA sets forth four facially objective criteria which are to be ascertained by the religious entity itself, and it provides that upon request, a "contract *shall* be provided without coverage for contraceptive methods" (Insurance Law § 3221[*l*][16][A]; § 4303[cc][1] [A] [emphasis added]). The exemption does not require any government official or designee to make a determination between religious and secular, and plaintiffs make no claim that such a governmental inquiry has been undertaken pursuant to the WHWA. The record reveals that some insurance companies have required plaintiffs to submit an affidavit or affirmation stating that they meet each of the four statutory criteria and are thus entitled to the exemption; no plaintiff in this action submitted such a statement, and there is no evidence that any insurer has ever looked beyond such a submission or the lack thereof. Thus, the statute, on its face, does not give rise to excessive entanglement between church and state.

We nevertheless acknowledge that the exemption may pose entanglement problems if an agency or court were required to consider the extent to which a particular plaintiff's ministerial activities are motivated by and infused with ecclesiastical and proselytizing purposes (*see Holy Spirit Assn. for Unification of World Christianity v. Tax Commn. of City of N.Y., supra* at 521, 450 N.Y.S.2d 292, 435 N.E.2d 662). Indisputably, as the dissent asserts, many religious organizations—including plaintiffs—view acts of charity and corporal works of mercy as manifestations of religious expression and a method of inculcating religious values. Moreover, we readily concede that "it is a significant burden on a religious organization to require it . . . to predict which of its activities a secular court will consider religious" (*Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, supra* at 336, 107 S.Ct. 2862). In their complaint, however, plaintiffs expressly conceded that they do not qualify for the exemption because their "primary focus . . . is not the inculcation of religious values" and because they both employ and serve people of many faiths. Inasmuch as no plaintiff ever claimed the exemption, a potentially entangling inquiry into plaintiffs' religious duty to inculcate religious values and spread the faith through their ministries was never conducted, and thus, this action gives us no occasion to consider an "as applied" challenge to the constitutionality of the exemption (*see Catholic Charities of Sacramento v. Superior Court of Sacramento County*, 32 Cal.4th 527, 546-547, 10 Cal.Rptr.3d 283, 85 P.3d 67 [2004], *supra*).

2. Larson v. Valente (456 U.S. 228 [1982])

Despite withstanding constitutional muster under the *Lemon* test, plaintiffs contend that the exemption discriminates between religious denominations in violation of *Larson v. Valente*, 456 U.S. 228, 102 S.Ct. 1673 [1982], *supra*. We do not agree.

In *Larson*, the United States Supreme Court invalidated a statutory provision that imposed registration and reporting requirements upon religions that received 50% or more of their contributions from members or affiliated organizations (*id.* at 231-232, 102 S.Ct. 1673). The Court stated that the Establishment Clause's "clearest command . . . is that one denomination cannot be officially preferred over another" (*id.* at 244, 102 S.Ct. 1673), and clearly indicated that denominational neutrality requires that the government remain neutral *as between sects* (*id.* at 246, 102 S.Ct. 1673). In this regard, the Court noted that the statute enacted by the Minnesota Legislature "does not operate evenhandedly, nor was it designed to do so: The [50%] rule . . . effects the *selective* legislative imposition of burdens and advantages upon particular denominations" (*id.* at 253-254, 102 S.Ct. 1673 [emphasis in original]). Indeed, the legislative history revealed that the statute had been drawn specifically to address the fund-raising practices of the Unification Church, referred to by one legislator as "the Moonies" (*see id.* at 254-255, 102 S.Ct. 1673).

In this case, the four criteria set forth in the exemption exclude religious organizations whose purposes include activities other than the inculcation of religious values (*see* Insurance Law § 3221[*l*][16][A][1][a]; § 4303[cc] [1][A] [i]). Thus, as revealed by the presence of the Baptist Church plaintiffs, the statute facially distinguishes between those religious institutions that create separate legal entities for their ecclesiastical and ministerial activities, and those religious institutions that do not. However, the line drawn in this case does not discriminate between religions or sects (*see Catholic Charities of Sacramento v. Superior Court of Sacramento County, supra* at 553-554, 10 Cal.Rptr.3d 283, 85 P.3d 67). This is demonstrated by the fact that most of the plaintiffs in this action are affiliated with a Catholic diocese, and while the statute may provide the dioceses themselves with the exemption, it is unavailable to the plaintiffs that are

affiliated Catholic entities. Accordingly, plaintiffs' claim that the WHWA includes an unconstitutional religious gerrymander under *Larson* is without merit because the exemption does not distinguish between religions or sects.

This conclusion is not undermined by references in the legislative record to the Catholic Church, or by the fact that an earlier version of the WHWA included a broad religious-based exemption that would have applied to any "group or entity [that] is operated, supervised or controlled by or in connection with a religious organization or denominational group or entity" (2001 N.Y. Senate Bill S. 5626, § 13; *see* 2001 N.Y. Senate Bill S. 3, § 11). Rather, the record reveals that the WHWA was caught in a legislative stalemate for a period of years in part because of the competing interests that were lobbied by the Catholic Church on one side, and advocates for women's health and gender equity on the other. While the record reveals that the Legislature narrowed the exemption with an eye toward accommodating the Catholic Church, the narrow exemption was adopted in an exercise of political compromise. The legislative record provides no basis for us to either discern or attribute a legislative intent to limit the exemption to the Catholic Church or to preclude other denominations from invoking it, and, as we have noted, it does not have that effect.

3. Church Autonomy

The principal flaw in plaintiffs' invocation of "church autonomy" is that the doctrine primarily requires the civil judiciary to defer to ecclesiastical tribunals on matters related to governance of a hierarchical church (*see Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-709, 96 S.Ct. 2372, 49 L.Ed.2d 151 [1976] [dispute concerning the divestiture of a bishop and the validity of the division of one diocese into three]; *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120 [1952] [dispute between the Russian

Orthodox Church in America and its Russian counterpart over the power to appoint the North American Archbishop]; *First Presbyt. Church of Schenectady v. United Presbyt. Church in U.S. of Am.*, 62 N.Y.2d 110, 116, 476 N.Y.S.2d 86, 464 N.E.2d 454 [1984] [dispute over local church's right to withdraw from the superior church bodies]). In other words, the doctrine of church autonomy applies to prevent civil government from "lend[ing] its power to one or the other side in controversies over authority or dogma" (*Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877, 110 S.Ct. 1595 [1990], *supra; see Catholic Charities of Sacramento v. Superior Court of Sacramento County, supra* at 541-543, 10 Cal.Rptr.3d 283, 85 P.3d 67). To the extent that *Kedroff* requires the Legislature to refrain from enacting laws that interfere with church governance, such a rule implicates the Free Exercise Clause (*Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., supra* at 117-121, 73 S.Ct. 143), and we have previously concluded that the WHWA does not impermissibly intrude upon plaintiffs' free exercise rights.

Moreover, plaintiffs' general assertions that the WHWA is unconstitutional because the contraception coverage mandate interferes with their relationships with their employees and constitutes an impermissible reach into the church treasury are novel contentions which, in our view, find no support in the law (*see Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 303-306, 105 S.Ct. 1953, 85 L.Ed.2d 278 [1985] [imposition of minimum wage and recordkeeping requirements does not violate Establishment or Free Exercise Clauses]; *see also United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051 [1982], *supra* [free exercise rights not violated by requirement to pay employment taxes]). This case simply does not involve a civil intrusion into internal church dispute resolution and, therefore, plaintiffs' "church autonomy" argument is unavailing.

IV. State Statutory Issues

A. Human Rights Law

The parties agree that group health insurance is a benefit of employment protected by the Human Rights Law. Plaintiffs cite Executive Law § 296(11), which states in relevant part:

> "Nothing contained in this section shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment . . . to persons of the same religion or denomination *or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained*" (emphasis added).

Plaintiffs contend that this provision preempts the area of the employer-employee relations when a religious-related employer is involved. They assert that Executive Law § 296(11) is an exclusive authority, and that it permits them to decline to provide their employees with coverage for contraceptives.[9]

Initially, we note that the doctrine of preemption, which is generally employed to resolve federal-state statutory conflicts, has no application in this claimed conflict between two provisions of state law. To the extent that plaintiffs present an issue of statutory construction on the ground that the contraceptive coverage mandate of the WHWA conflicts with the exemption for religious-related employers from the application of *Executive Law* § 296, nothing in *Executive Law* § 296(11) suggests that the Legislature may not, in another section of law, impose affirmative requirements upon reli-

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[9] We express no view on whether the exemption from the Human Rights Law would include such an action, if taken by plaintiffs.

gious-related employers. *Executive Law* § 296(11) merely excuses such employers from compliance with *Executive Law* § 296. Accordingly, plaintiffs' reliance on *Executive Law* § 296(11) is without merit.

B. Religious Corporations Law

Plaintiffs argue that certain provisions of the Religious Corporations Law "explicitly subordinated" the WHWA to the governance of religious denominations and their ecclesiastical governing bodies, and hence, the Legislature may not impose the contraceptive coverage mandate upon the Baptist Church plaintiffs, which are religious corporations. As relevant here, "[t]he primary purpose of the Religious Corporations Law is to provide an orderly method for the administration of the property and temporalities dedicated to the use of religious groups" (*Morris v. Scribner*, 69 N.Y.2d 418, 423, 515 N.Y.S.2d 424, 508 N.E.2d 136 [1987]). Plaintiffs cite Religious Corporations Law §§ 5 and 26, which address the powers and duties of the trustees of religious corporations and the authority to control the "times, nature or order" of worship, respectively. As noted by Supreme Court, there is nothing in these provisions that purports to insulate plaintiffs from a generally applicable law such as the WHWA. Accordingly, we conclude that plaintiffs' reliance on the Religious Corporations Law is unavailing.

V. Conclusion

In sum, in enacting the WHWA, the Legislature provided an exemption from the contraceptive coverage mandate which generally includes religious institutions in their capacity as ecclesiastical bodies, but which may not include religious institutions in their capacity as ministries. As we have noted, the contraceptive coverage mandate burdens plaintiffs' right to freely exercise their religious beliefs. However, despite this burden, our review of the WHWA and its exemption for "religious employers" leads us to the

conclusion that the WHWA does not offend the constitutional or statutory provisions invoked by plaintiffs. Moreover, while we are mindful that the exemption could give rise to entanglement problems if a court or agency were asked to determine what types of religious activity constitute the inculcation of religious values, such an inquiry is not presented here in light of plaintiffs' concessions that their primary focus is not the inculcation of religious values. To the extent that any of the arguments asserted in plaintiffs' brief are not explicitly addressed herein, they have been thoroughly considered and found to be lacking in merit.

PETERS and CARPINELLO, JJ., concur.

CARDONA, P.J. (dissenting).

Inasmuch as we cannot agree that the Women's Health and Wellness Act (hereinafter WHWA) comports with various clauses of the First Amendment of the U.S. Constitution, as well as comparable provisions of the N.Y. Constitution, we respectfully dissent.

I. Introduction and Legislative Overview of the WHWA

Significantly, over 20 states currently have statutes addressing the issues of prescription contraceptive coverage and gender equity in the provision of health care. The difficulty in reconciling legitimate concerns over gender equity in public health and the interest in accommodating the beliefs of religious entities has produced legislation that is by no means uniform. Certain states have chosen not to include any religious exemption and any employer who provides prescription coverage to its employees must include coverage for contraceptives (*see e.g.* Ga. Code Ann. § 33-24-59.6; 215 Ill. Comp. Stat. 5/365z.4; Iowa Code § 514C.19; N.H. Rev. Stat. Ann. §§ 415:18-i, 420-A:17-c, 420-B:8-gg; Vt. Stat. Ann. tit. 8, § 4099c; Va. Code Ann. § 38.2-3407.5:1). A few states, including California (*see* Cal. Health & Safety Code § 1367.25; Cal. Insurance Code § 10123.196), have enacted contraceptive equity laws that include exemptions so narrowly drawn that only religious organizations serving in their alleged ecclesiastical capacity, as opposed to their so-called "secular" endeavors, can exclude contraceptive coverage from their prescription benefits (*see e.g.* Ariz. Rev. Stat. § 20-826; Ark. Code Ann. § 23-79-1102; Haw. Rev. Stat. §§ 431:10A-116.6, 431:10A-116.7; N.C. Gen. Stat. § 58-3-178). In contrast, the majority of states have enacted contraceptive statutes that contain broadly worded exemptions

which include definitions of religious organizations[10] that would encompass church-controlled entities such as plaintiffs herein (*see e.g.* Conn. Gen. Stat. § 38a-503e; Del. Code Ann. tit. 18, § 3559; 24-A Me. Rev. Stat. Ann. § 2847-G; Md. Code Ann., Insurance § 15-826; Mass. Gen. Laws Ann. 176G § 40; R.I. Gen. Laws §§ 27-19-48, 27-18-57, 27-20-43, 27-41-59; Tex Insurance Code Ann. § 1369.108; Wash. Rev. Code § 70.47.160; West Va. Code §§ 33-16E-2, 33-16E-7; *see also* Mo. Rev. Stat. § 376.1199; Nev. Rev. Stat. § 689B.0376; N.M. Stat. Ann. § 59A-22-42).

Turning to our New York statute, prior to enacting the WHWA, the Legislature struggled with the issue of how to

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[10] For example, Connecticut, Massachusetts, Rhode Island and West Virginia utilize a broad exemption which includes, inter alia, the federal definition of "church-controlled organizations" contained in 26 USC § 3121(w):

> "(3) Definitions.—
>
> (A) For purposes of this subsection, the term 'church' means a church, a convention or association of churches, or an elementary or secondary school which is controlled, operated, or principally supported by a church or by a convention or association of churches.
>
> (B) For purposes of this subsection, the term 'qualified church-controlled organization' means any church-controlled tax-exempt organization described in section 501(c)(3), other than an organization which—
>
> (i) offers goods, services, or facilities for sale, other than on an incidental basis, to the general public, other than goods, services, or facilities which are sold at a nominal charge which is substantially less than the cost of providing such goods, services, or facilities; and
>
> (ii) normally receives more than 25 percent of its support from either (I) governmental sources, or (II) receipts from admissions, sales of merchandise, performance of services, or furnishing of facilities, in activities which are not unrelated trades or businesses, or both.

address the concerns of religious organizations opposed to contraceptives as a tenet of their faith. The question was to what extent and in what manner they should be exempted from the statutory requirements. As noted by defendant, an earlier version of the legislation included an exemption from the prescription coverage provision for any group or entity "operated, supervised or controlled by or in connection with a religious organization or denominational group or entity" (2001 N.Y. Senate Bill S. 3, § 11). It was mentioned in the course of the legislative debate that this exemption was modeled after similar language defining a religious organization or employer already existing in a New York statute (*see* Senate Floor Debates, June 20, 2001, at 10421, remarks of Sen. John Bonacic; *see also* Executive Law § 296[11]). It was further explained at that time that the legislation would include a provision whereby the employees of an exempt organization who sought to utilize contraceptives would be able to do so by means of a rider which, for a nominal cost, would allow the employees to purchase contraceptives at the reduced group rate (*see e.g.* Senate Floor Debates, June 20, 2001, at 10353, remarks of Sen. Joseph Bruno).[11] According to defendant, this version of the legislation did not pass due to, inter alia, objections that the "broad exemption . . . would have encompassed hundreds of employers who, like [p]laintiffs, are engaged in the provision of . . . social services to the public at large." Along with other concerns,[12] certain

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[11] The record indicates that the religious organizations concerned were comfortable with this solution, presumably because it does not involve a situation where the religious employer would be "facilitating" the use of contraceptives in violation of its religious tenets (*see* Senate Floor Debates, June 20, 2001, at 10356, remarks of Sen. Joseph Bruno).

[12] One objection raised concerning the broad religious exemption was the fact that many of the religious organizations receive public funds (*see* Senate Floor Debates, June 20, 2001, at 10408-10409). The relevance of that fact has not been well explained given that the WHWA applies to "all insurance plans purchased by employers and therefore [is] not at all tied to

of the legislators objected to the broader exemption on the basis that, even though the price of contraceptives with the rider would be cheaper than paying for them out of pocket, it was still more than the employees of nonreligious organizations would pay and, therefore, did not meet the statute's goal of covering as many employees as possible (*see e.g.* Senate Floor Debates, June 20, 2001, at 10416).[13]

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the receipt of public funds," nor does it appear that receipt of public funds renders a religious organization less "religious in character" (Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 Harv. J. L. & Pub. Pol'y 741, 757 n. 74 [2005]).

[13] Notably, the record debate did not appear to include a discussion of what effect there would be if the exemption were written less broadly and the nonexempt religious organizations chose to opt out rather than provide coverage in contravention of their religious beliefs. Although some legislators expressed concern about the employees of exempt religious employers being treated unfairly by having to pay a little more when utilizing the insurance rider, realistically, it is unlikely that any non-Catholic employee who, for instance, chooses to work for an entity such as plaintiff Catholic Charities of the Diocese of Albany could seriously claim to be surprised if direct access to contraceptives through the employer were not available. In the affidavit provided by plaintiff Carmelite Sisters for the Aged and Infirm, for example, it is stated that all prospective employees are specifically informed that they are expected to conform to Catholic strictures with respect to their employment. As noted by the majority, the Catholic Church's position on birth control is well known. "Employees who take employment with a Catholic employer do so with the understanding of the Church's position and with no expectation that the Catholic employer will act in a way inconsistent with its beliefs" (*see* Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 Harv. J. L. & Pub. Pol'y 741, 763 [2005]). Significantly, "just as employees choose not to work for particular employers for any number of reasons, employees are free to avoid employment with Catholic entities if they are unwilling to accept the additional cost of contraception that is a consequence of the employer's compliance with a core position of the Catholic church" (*id.* at 763-764).

The version of the legislation that ultimately passed contained a much narrower religious exemption which applied only to a select group of religious organizations and was modeled on the statute enacted in California. Specifically, the WHWA includes an express exemption for "religious employers" if prescription contraceptive methods are "contrary to the religious employer's religious tenets" (Insurance Law § 3221[*l*][16] [A]; § 4303[cc][1]). The WHWA defines a religious employer as an entity that satisfies four criteria: (1) the inculcation of religious values is the purpose of the entity; (2) the entity primarily employs persons who share the religious tenets of the entity; (3) the entity serves primarily persons who share the religious tenets of the entity; and (4) the entity is a nonprofit organization as described in 26 USC § 6033(a)(2)(A)(i) or (iii) (Internal Revenue Code of 1986, as amended)[14] (*see* Insurance Law § 3221[*l*] [16][A][1]; § 4303[cc][1][A]). Any eligible religious employer who invokes this exemption is required to "provide written notice to prospective enrollees prior to enrollment with the plan, listing the contraceptive health care services the employer refuses to cover for religious reasons" (Insurance Law § 3221[1][16] [A][2]). Notably, employees of such a religious employer are not deprived of the opportunity to obtain affordable contraceptives inasmuch as they are entitled "to directly purchase [a] rider . . . at the prevailing small group community rate" (Insurance Law § 3221[1][16][B][i]). Defendant acknowledges that the cost of the rider is low. Significantly, the statement of justification for the WHWA by its Senate sponsor states that the legislation "also ensures that any en-

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[14] Four of the subject plaintiffs meet the fourth WHWA religious exemption requirement, namely, St. John the Baptist Church, Temple Baptist Church, First Bible Baptist Church and Carmelite Sisters for the Aged and Infirm. Pursuant to this exacting requirement alone, only an entity such as a church or religious order could realistically qualify for the exemption. However, as noted by plaintiffs, this tax return provision appears to have no relationship to the health care goals of the WHWA.

rollee not provided contraceptive coverage through a religiously exempt organization can otherwise directly access [it] from [his or her] basic health insurer at a cost that shall be the same as if the employer had not opted for the exemption" (Senate Introducer Mem. in Support, at 2, Bill Jacket, L. 2002, ch. 554).[15] Thus, we are presented with a situation where the employees of nonexempt religious organizations are not guaranteed affordable contraceptives since, as pointed out by the majority, such employers can avoid subsidizing contraceptive use by simply not providing any prescription benefits to their employees. In contrast, employees of exempt religious employers always have the option of personally obtaining contraceptives at a reduced cost by utilizing the insurance rider.[16]

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[15] While the rates for the riders are approved by the State Insurance Department, Supreme Court estimated that the monthly cost to exempt religious employees to directly purchase the riders would be "on the order of $1.00 to $2.00 per month," an amount that appears, from one of the health insurance rate sheets in the record, to offset the savings to employees of exempt religious organizations realized as a result of the fact that their employer-provided prescription plans do not include contraceptive coverage.

[16] Plaintiffs assert that they are disinclined to opt out of providing prescription benefits because it would violate their "sincerely-held religious beliefs regarding the moral obligation of employers to provide a dignified livelihood, including fair, adequate and just employment benefits, to their employees." However, as noted by one commentator, "when forced to confront the choice between participating in an intrinsically evil act and attempting to satisfy their obligation to pay just wages and benefits in another manner, some institutions may very well decide that ceasing to provide any prescription coverage is the lesser evil" (Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 Harv. J. L. & Pub. Pol'y 741, 774 [2005]). Inasmuch as defendant estimates that religious organizations in New York similarly situated to plaintiffs employ somewhere between 50,000 to 500,000 employees, a wholesale decision to opt out of providing prescription benefits by these employers would leave a significant number of workers

Significantly, plaintiffs herein are all nonprofit religious organizations, churches and religious orders that qualify for the status of religious employers in other statutory contexts such as employment and housing discrimination (*see Executive Law* § 296[11]). As will hereinafter be explained in greater detail, it is our view that plaintiffs have successfully articulated a challenge to the WHWA based principally upon the religious exemption's overly-strict requirements that define what is "religious" conduct and determines that entities engaging in conduct deemed to be "secular" in nature are not entitled to exemptions from providing contraceptives in opposition to their religious beliefs. Additionally, we are concerned that the strictures of the WHWA and its extremely narrow religious employer exemption could result in a smaller, rather than larger, number of women receiving prescription coverage, contrary to the stated goal of the legislation.

In a case of this nature involving various parties who have presented their respective arguments extremely well, it is often helpful to step back and focus on where they agree and disagree. Here, there can be no question that the Legislature recognizes the moral concerns voiced by the religious organizations who oppose the use of contraceptives as a matter of faith, which is why a religious exemption is included in the WHWA. Moreover, it is clear that plaintiffs are principally objecting to the statute's failure to exempt all bona fide religious organizations from its mandate. Thus, the real source of the controversy herein stems from the WHWA's definition of what constitutes a religious employer.

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without any prescription coverage. Indeed, "[a]ll employees of Catholic institutions would be worse off if this option is chosen. It will be little solace to a female employee of a Catholic employer to be told that she is being treated equally with male employees when equality can be achieved only by putting her in a much worse position than she was when she was theoretically being treated as less than equal" (*id.* at 774).

Plaintiffs argue that their conduct in providing social and educational services to all persons, regardless of their faith, is undertaken because of their religious tenets and they understandably object to the WHWA's clear determination that such activities are "secular." Plaintiffs raise a valid point. We fail to see where the record establishes that an organization is automatically secular and not religious in nature if it employs or serves persons of different faiths or engages in the provision of charitable or social services. Nor do we see that making such assumptions and engaging in the formulation of "religious tests" is an appropriate area of inquiry for the Legislature or the courts (*see Espinosa v. Rusk*, 634 F.2d 477, 480 [10th Cir.1980], *affd.* 456 U.S. 951, 102 S.Ct. 2025, 72 L.Ed.2d 477 [1982]; *see also Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 332 n. 6, 339, 107 S.Ct. 2862, 97 L.Ed.2d 273 [1987] [referring to a religious test formulated by the District Court to distinguish between secular and religious conduct as an "intrusive inquiry into religious belief"]). Instead, we endorse the view that "[w]hen, as here, particular purposes and activities of a religious organization are claimed to be other than religious, the civil authorities may engage in but two inquiries: Does the religious organization assert that the challenged purposes and activities are religious, and is that assertion bona fide?" (*Matter of Holy Spirit Assn. for Unification of World Christianity v. Tax Commn. of City of N.Y.*, 55 N.Y.2d 512, 521, 450 N.Y.S.2d 292, 435 N.E.2d 662 [1982]; *see Matter of Faith Bible Church v. Hudacs*, 179 A.D.2d 308, 310-311, 582 N.Y.S.2d 841 [1992]).

II. Constitutional Issues

A. Free Exercise-NY Constitution

Turning to the various constitutional challenges presented herein, we initially conclude that plaintiffs have established a meritorious claim pursuant to New York's Free Exercise

Clause (N.Y. Const., art. I, § 3). As noted by the majority, the Court of Appeals has articulated a test that balances "'the interest of the individual right of religious worship against the interest of the State which is sought to be enforced'" (*People ex rel. DeMauro v. Gavin*, 92 N.Y.2d 963, 964, 683 N.Y.S.2d 750, 706 N.E.2d 738 [1998], quoting *People v. Woodruff*, 26 A.D.2d 236, 238, 272 N.Y.S.2d 786 [1966], *affd.* 21 N.Y.2d 848, 288 N.Y.S.2d 1004, 236 N.E.2d 159 [1968]). "The process of the balancing of interests is twofold: first, a determination whether a restriction will be thus imposed on the individual's freedom of worship; and secondly, a determination whether the presence of a restriction is justified, after a consideration of the social and constitutional values involved" (*People v. Woodruff, supra* at 238, 272 N.Y.S.2d 786).

Significantly, the majority acknowledges that the legislation burdens plaintiffs' rights under the Free Exercise Clause of the First Amendment. Furthermore, in our opinion, there can be little question that plaintiffs have established that the WHWA restricts their right to freedom of worship. As for the issue of whether the restriction is justified under all the relevant circumstances, we do not find that the result of the balancing test favors defendant. Notably, defendant indicates that the competing state interests herein are the laudable goals of gender equity and "ensuring that the maximum number of women will receive necessary preventive health care." Defendant also goes into great detail in an attempt to show the detriments to employees without contraceptive coverage.

In balancing the stated competing interests, the majority finds significant the fact that plaintiffs employ persons of different faiths, a circumstance we do not find to be dispositive. Furthermore, the majority balances the free exercise issue in defendant's favor with the observation that "plaintiffs could avoid the contraceptive coverage mandate by with-

holding all prescription coverage."[17] However, such a course of action would clearly undermine the articulated state interest involved herein, namely, ensuring that the maximum number of women receive the best possible health care. If, in fact, religious organizations such as plaintiffs "avoid" the contraceptive issue by withholding all prescription coverage or switching to self-funded plans, in our opinion, the justification for restricting plaintiffs' free exercise rights vanishes, tipping the scale in plaintiffs' favor on the issue of the WHWA's constitutionality. In sum, while we do not disagree with the majority's determination that the Legislature has presumably found facts which merit legislation aimed at promoting gender equity in the provision of health care, we cannot agree that a religious employer exemption that burdens religious employers' rights is itself justified in light of the fact that the exemption may ultimately cause a greater number of women employed by nonexempt religious organizations to be without adequate health coverage.[18]

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[17] While it is possible that nonexempt religious employers could provide their own self-funded plans, there seems little to be gained by defendant encouraging that result since, not only would such plans not include contraceptive coverage, it cannot be assured that such plans would include the low cost insurance riders that currently allow employees of *exempt* religious employers to purchase contraceptives at a low cost if so desired. Furthermore, the state's interest in advocating the WHWA can hardly be a significant one if it is tacitly encouraging religious organizations to avoid its strictures by funding its own plans.

[18] Although the majority indicates that we are implicitly urging the broader religious employer exemption not adopted by the Legislature, the debate over its inclusion is long past. However, that is not to say that an overview of the history of a statute under review, as well as the approach taken by other states, serves no purpose. For example, since concern over whether there would be sufficient contraceptive coverage for plaintiffs' employees was one of the principal reasons for rejecting the broader religious employer exemption, it is especially troubling for us to see that plaintiffs' ability to opt out and not provide group coverage consistent with the WHWA is cited as one of the justifications for upholding the

B. "Hybrid" Rights

Next, we disagree that plaintiffs have not articulated a valid claim under the U.S. Constitution. As previously stated, the majority agrees that "the qualified mandated coverage for prescription contraceptives burdens [plaintiffs'] free exercise rights." However, since the WHWA is allegedly neutral on its face and generally applicable, the majority deems plaintiffs' free exercise claims to be insufficient to warrant strict scrutiny under the reasoning of *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 899, 110 S.Ct. 1595, 108 L.Ed.2d 876 [1990]. Assuming arguendo that the majority's assessment of the neutrality of the WHWA is correct, it is nevertheless our view that the combination of the free exercise claims with other First Amendment violations sufficiently constitutes a meritorious "hybrid" constitutional claim as described in *Smith* (*see id.* at 881-882, 110 S.Ct. 1595).

1. Expressive Association

Specifically, we are persuaded by the claim that the WHWA violates plaintiffs' right to free speech under the U.S. and N.Y. Constitutions. In our view, plaintiffs present a compelling argument in support of their expressive association claim. Significantly, plaintiffs allege that the WHWA imposes upon them an unwanted affiliation when they argue that a "compelled association exists because [plaintiffs] are

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constitutionality of that statute. It must be remembered that no one here is arguing that persons *not* employed by plaintiffs are in any danger of losing coverage under the WHWA. The entire debate over the religious employer exemption, and the state's allegedly compelling interest, concerns only persons employed by entities such as plaintiffs. Thus, if the statute is upheld with the understanding that every nonexempt employer in plaintiffs' circumstances could opt out for religious reasons, one could well question the Legislature's purpose in enacting a religious employer exemption that not only excludes plaintiffs from its qualification but also plaintiffs' employees from access to the low-cost rider.

forced to join the ranks of other employers and provide contraceptive coverage as part of their employee health plans."[19] Plaintiffs' concern over being grouped with employers who could well endorse contraceptive use is understandable in the context of their well-documented belief that contraceptive use is immoral. They contend that being forced to provide a message of support for contraceptives (by paying for them), "sends a distinctly different message" from their official position on the subject and "significantly affect[s] its expression" (*Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656, 120 S.Ct. 2446, 147 L.Ed.2d 554 [2000]). Thus, plaintiffs have persuasively demonstrated that requiring them to subsidize contraceptives as the sole means of providing group prescription coverage to their employees is inconsistent with their values and "impairs their collective longstanding, publicly stated and commonly understood position that such devices and drugs are immoral and should not be used." Consequently, we believe the WHWA violates plaintiffs' freedom of expressive association (*see id.* at 656-657, 120 S.Ct. 2446).

2. Conduct as Protected Speech

Additionally, we find that the facilitation of contraceptive coverage by plaintiffs, even when the cost to the employer is negligible, violates plaintiffs' free speech rights because it compels them to engage in *conduct* that communicates a message of support for contraceptive use that is in violation

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[19] Unlike the majority, we find plaintiffs' arguments that they not be included with other groups that do not object to the facilitation of contraceptives coverage to be well represented in both their briefs and the record before us, particularly in their strong objections to being included in the grouping of "secular" employers, as opposed to "purely religious employers." Plaintiffs clearly convey their adherence to their beliefs regardless of whether those beliefs could be considered unpopular or outside the mainstream. Accordingly, we would not agree that plaintiffs' arguments should be disregarded.

of their religious beliefs.[20] Significantly, "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all[, and a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts" (*Wooley v. Maynard*, 430

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[20] The majority's reliance on cases dealing with a government *restriction* of expressive conduct (*see e.g. Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 [1984]; *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 [1969]) appears inapt under the circumstances. Plaintiffs have not alleged an impermissible time, place or manner restriction upon their speech or conduct. On the contrary, plaintiffs claim that the WHWA amounts to a *requirement* that they disseminate a particular philosophical viewpoint by implicitly endorsing the use of contraceptives. Under these circumstances, plaintiffs have no burden to establish that the conduct in question amounts to expressive conduct (*compare Wooley v. Maynard*, 430 U.S. 705, 714-715, 97 S.Ct. 1428, 51 L.Ed.2d 752 [1977], *with Clark v. Community for Creative Non-Violence, supra* at 292-293, 104 S.Ct. 3065).

Nevertheless, we find considerable proof that plaintiffs intended to convey a message by *not* providing contraceptive coverage. For instance, the record establishes that, prior to the enactment of the WHWA, new employees of Catholic Charities "were informed during orientation that [, consistent with the teachings of the Roman Catholic Church,] coverage for contraceptive drugs and devices were not provided." One commentator persuasively suggests that a refusal to fund contraceptives is a form of political free speech closely linked to a free exercise claim (*see* Lowell, *Striking a Balance: Finding a Place for Religious Conscience Clauses in Contraceptive Equity Legislation*, 52 Clev. St. L. Rev. 441, 457 [2004-2005]). Significantly, echoed repeatedly in the record and in plaintiffs' brief is their unwavering assertion that the act of subsidizing coverage that their religion prescribes as morally evil cannot be condoned regardless of whether any employee actually utilized the coverage or how little it would cost them out-of-pocket to provide it. In fact, it seems clear that plaintiffs would oppose this coverage even if there were no cost to them or if doing so provided them a financial benefit. Accordingly, we find the message expressed by plaintiffs with their actions (and lack thereof) to be straightforward.

U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 [1977] [citation omitted]). Thus, in cases where a law has forced an individual to espouse a particular viewpoint or suffer a penalty for noncompliance, the United States Supreme Court has generally invalidated such a direction (*see e.g. Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 [1977]; *Wooley v. Maynard, supra* at 717, 97 S.Ct. 1428; *Miami Herald Publ. Co. v. Tornillo*, 418 U.S. 241, 258, 94 S.Ct. 2831, 41 L.Ed.2d 730 [1974]).

Here, plaintiffs advance a forceful argument that "financial support is a form of sponsorship or endorsement." As one commentator aptly notes, "[i]t is not enough for religious employers to say they are morally opposed to contraception if they are simultaneously paying for employees to obtain it; the condemnation of the act is inauthentic if religious employers are paying for what they believe to be immoral" (Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 Harv. J. L. & Pub. Pol'y 741, 761 [2005]). Moreover, we do not believe that the Catholic plaintiffs' well-known opposition to contraceptives rules out the "conduct as expressive speech" issue. It is the fact that their opposition is so public and widespread which makes the Catholic plaintiffs, in particular, more susceptible to charges of hypocrisy, especially since, as has been emphasized, these plaintiffs could avoid supporting contraceptive use by choosing not to provide any prescription coverage to their employees. However, opting out of providing any prescription coverage to a religious organization's employees carries with it a penalty in addition to a violation of a religious employer's moral duty to care for its employees. It would be very difficult to argue that such an action would not also penalize the employer financially, since competitive employers must provide decent benefits packages to attract the most competent employees (*see* Stabile, *State Attempts to Define Religion: The Ramifications of Applying*

Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers, 28 Harv. J. L. & Pub. Pol'y 741, 774 [2005]).

In any event, given the meritorious arguments raised by plaintiffs pursuant to the Free Exercise and Free Speech Clauses, we believe that a sufficient "hybrid" claim by plaintiffs has been presented under the *Smith* standard so as to warrant application of strict scrutiny. Notably, to meet the standard of strict scrutiny, a statute must be both justified by a compelling governmental interest and narrowly tailored to further that interest (*see Larson v. Valente*, 456 U.S. 228, 247, 102 S.Ct. 1673, 72 L.Ed.2d 33 [1982]). Here, the WHWA's contraceptive mandate is not justified by a compelling governmental interest inasmuch as the state's interest in gender equity and ensuring that the maximum number of women receive health coverage bears little relationship to a statute that encourages certain nonexempt religious organizations to opt out of providing prescription coverage to their employees as the principal way to avoid compromising their religious beliefs. Clearly, a statute drafted in such an "all or nothing" manner is not narrowly tailored so as to expand benefit coverage to women and is, in our view, unconstitutional.

C. Establishment Clause

We are also persuaded by plaintiffs' challenges to the WHWA pursuant to the Establishment Clause of the First Amendment. Assuming arguendo that the majority is correct in finding that plaintiffs cannot mount a challenge to the WHWA as applied, we are nonetheless unconvinced that the WHWA survives a facial challenge. While it is true that "statutes that give special consideration to religious groups are [not] *per se* invalid" (*Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338, 107 S.Ct. 2862 [1987], *supra*) and that "government may generally separate the religious from the secular to decide how it will dispense its benefits" (*Catholic Charities*

of Sacramento v. Superior Court of Sacramento County, 32 Cal.4th 527, 575, 10 Cal.Rptr.3d 283, 85 P.3d 67, 100 [2004] [Brown, J., dissenting]; *see e.g. Bowen v. Kendrick*, 487 U.S. 589, 609, 108 S.Ct. 2562, 101 L.Ed.2d 520 [1988]; *Roemer v. Board of Pub. Works of Maryland*, 426 U.S. 736, 746-747, 96 S.Ct. 2337, 49 L.Ed.2d 179 [1976]), government should nonetheless not be allowed to "parse a bona fide religious organization into 'secular' and 'religious' components solely to impose burdens on the secular portion" (*Catholic Charities of Sacramento v. Superior Court of Sacramento County, supra* at 575, 10 Cal.Rptr.3d 283, 85 P.3d 67 [Brown, J., dissenting]; *see e.g. Cantwell v. Connecticut,* 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 [1940]; *Espinosa v. Rusk*, 634 F.2d 477, 481-482 [1980], *supra*).

In rejecting plaintiffs' claim that the various prongs of the WHWA exemption evidence a denominational preference (*see generally Larson v. Valente, supra* at 244-246, 102 S.Ct. 1673), the majority differentiates between a law which discriminates between denominations and one which merely discriminates "between those religious institutions that create separate legal entities for their ecclesiastical and ministerial activities, and those religious institutions that do not." In our view, this is a distinction with very little difference. For example, the differentiation between secular and ecclesiastical functions which is embodied in the inculcation prong of the religious employer exemption presupposes that sincere and meaningful religious expression exists only when a given religious sect is engaged in its ecclesiastical activities. On the contrary, a great many religious denominations-including several represented by plaintiffs herein-view acts of charity and other so-called "secular" pursuits as a significant manifestation of religious expression (*see Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, supra* at 344, 107 S.Ct. 2862 [Brennan, J., concurring] [characterizing the provision of community service "as a means of fulfilling religious duty and of providing an exam-

ple of the way of life a church seeks to foster"]). To the extent that another denomination may not engage in any charitable endeavors whatsoever, the "inculcation-only" requirement implicitly affords a benefit to that denomination which is unavailable to one which engages in charitable functions, regardless of whether the latter denomination chooses to house its charitable activities in a separate legal entity.[21] Simply stated, we have great difficulty with a statutory scheme which explicitly dissects the laudable activities of a given religious organization into two unequal parts, i.e., secular and ecclesiastical, and affords only the ecclesiastical portion an exemption from mandated conduct which the entire organization deems objectionable. Inasmuch as "[j]udging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims'" (*Employment Div., Dept. of*

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[21] It is worth re-emphasizing that the inculcation prong at issue requires that the teaching of religious values be "*the* purpose" of the entity (Insurance Law § 3221[*l*][16][A][1][a] [emphasis added]). Given the presence of the definite article in the statute, it is logical to assume that a religious organization may only be eligible for the exemption if its *singular* purpose is the promotion of religious belief (*see* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 252; *compare* Ark. St. § 23-79-1102[3][B] [Arkansas religious employer need only have "one (1) of its primary purposes [be] the inculcation of religious values" in order to qualify for the exemption]). For example, Carmelite Sisters would be ineligible for the exemption because, according to plaintiffs, "their purpose is the inculcation of religious values but when offering health care services to the community through their members" that is not their purpose. Thus, the inculcation prong of the statutory exemption has the potential to do significantly more than merely distinguish between religious institutions that choose to exercise a ministerial function via an independent legal entity and those that do not. In our view, a group such as Carmelite Sisters, if it applied for the WHWA exemption, could find itself ineligible simply due to the fact that it has chosen to engage in pastoral work as a secondary purpose of its organization (*see Catholic Charities of Sacramento v. Superior Court of Sacramento County*, *supra* at 571 n. 2, 10 Cal.Rptr.3d 283, 85 P.3d 67 [Kennard, J., concurring]).

Human Resources of Oregon v. Smith, 494 U.S. 872, 887, 110 S.Ct. 1595 [1990], *supra*, quoting *United States v. Lee*, 455 U.S. 252, 263 n. 2, 102 S.Ct. 1051, 71 L.Ed.2d 127 [1982] [Stevens, J., concurring]; *accord University of Great Falls v. National Labor Relations Bd.*, 278 F.3d 1335, 1343 [D.C. Cir.2002]), we would subject this aspect of the WHWA to the exacting level of scrutiny deserving of an outright denominational preference (*see Larson v. Valente*, 456 U.S. 228, 247, 102 S.Ct. 1673 [1982], *supra*). As in the context of plaintiffs' hybrid free exercise/free speech claim, application of strict scrutiny leads us to conclude that the statute is not narrowly tailored to serve a compelling state interest. We would accordingly find the WHWA invalid under Establishment Clause principles on that basis.

Moreover, even if it cannot be said that the WHWA's division between "secular" and "ecclesiastic" does not, on its face, amount to the functional equivalent of a denominational preference, this distinction poses an additional significant Establishment Clause difficulty. Specifically, pursuant to the third prong of the tripartite test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 [1971], it is our belief that the WHWA evinces a decided tendency to excessively entangle the state in the internal affairs of religious organizations (*see Catholic Charities of Sacramento v. Superior Court of Sacramento County, supra* at 582, 10 Cal.Rptr.3d 283, 85 P.3d 67 [Brown, J., dissenting]).

It cannot be questioned "that religious freedom encompasses the 'power (of religious bodies) to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine' " (*Serbian E. Orthodox Diocese for U.S. of Am. & Can. v. Milivojevich*, 426 U.S. 696, 722, 96 S.Ct. 2372, 49 L.Ed.2d 151 [1976], quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116, 73 S.Ct. 143, 97 L.Ed. 120 [1952]; *see Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day*

Saints v. Amos, 483 U.S. 327, 344, 107 S.Ct. 2862 [1987] [Brennan, J., concurring], *supra*). Under the instant statutory scheme, however, a bona fide religious entity is, in effect, constrained to organize and conduct itself according to a particular model or suffer the consequence of finding itself ineligible for the religious employer exemption. In requiring that "inculcation of religious values [be] the purpose of the entity" (Insurance Law § 3221[*l*][16][A][2]), the Legislature has interjected itself into the entity's internal governance and limited its organizational autonomy by requiring that the entity arrange its various subparts in such a way as to comply with the statute. In sum, this requirement compels a given religious entity to either engage in no allegedly "secular" endeavors whatsoever or compartmentalize those pursuits into subsidiaries in order to preserve exemption eligibility for the entity's "ecclesiastical" wing.

Furthermore, the separate requirement that the entity primarily employ individuals that share the entity's religious convictions has a three-fold coercive impact upon a religious organization's internal affairs. First, this qualification impliedly requires the entity to engage in a searching inquiry of its prospective employees in order to insure continued compliance with the statutory mandate.[22] Beyond this, the statute

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[22] For instance, although Carmelite Sisters do assert that they employ and serve persons outside their faith, it is also stated in their affidavit that they "do not ask our employees to state their religious affiliation as a condition for employment." Thus, whether the population they employ and serve is "primarily" outside their Catholic faith is an open question unless they inquire of these persons about their beliefs as a means of complying with the religious exemption. Even if a religious organization chose to make such potentially controversial inquiries, there is no guidance as to how it should respond if the persons involved do not wish to share the particulars of their faith upon questioning. We do not believe that the fact that the statute seems to require employers seeking the exemption to make all the entangling inquiries (as opposed to the government) is dispositive of the issue, inasmuch as "the Constitution's protection is not limited to direct interference with fundamental rights"

requires that the entity ultimately refrain from employing otherwise qualified personnel who may not necessarily share the entity's religious beliefs. Finally, in mandating that the entity primarily serve individuals who share the same religious tenets, the Legislature unfortunately prevents the entity from indiscriminately serving the community as a whole, lest it unwittingly provide food, shelter or counsel to an excessive number of individuals who happen to have divergent religious beliefs. In our opinion, these exemption requirements, both alone and in concert, impermissibly intrude upon a religious organization's established "interest in autonomy in ordering [its] internal affairs" (*Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, supra* at 341, 107 S.Ct. 2862 [Brennan, J., concurring]). Such excessive governmental entanglement with the internal affairs of a given organization compels us to a finding that the WHWA is invalid (*see Bowen v. Kendrick*, 487 U.S. 589, 602, 108 S.Ct. 2562 [1988], *supra*).

For all the above reasons, we find that the WHWA violates various clauses of the U.S. and N.Y. Constitutions.

SPAIN, J., concurs.

ORDERED that the order is affirmed, without costs.

(*Healy v. James*, 408 U.S. 169, 183, 92 S.Ct. 2338, 33 L.Ed.2d 266 [1972]).

APPENDIX D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

DECISION/ORDER

Index No. 8229-02
RJI No. 01-03-072905

CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY; THE SERVANTS OF RELIEF FOR INCURABLE CANCER; TEMPLE BAPTIST CHURCH; OUR LADY OF CONSOLATION GERIATRIC CARE CENTER; DELTA DEVELOPMENT OF WESTERN NEW YORK, INC.; ST. JOHN THE BAPTIST CHURCH; CATHOLIC CHARITIES OF THE DIOCESE OF OGDENSBURG; BISHOP LUDDEN HIGH SCHOOL; FIRST BIBLE BAPTIST CHURCH; CARMELITE SISTERS FOR THE AGED AND INFIRM, INC.,

Plaintiffs,

--against--

GREGORY V. SERIO, Superintendent, New York State Department of Insurance,

Defendant.

Supreme Court, Albany County: Motion Term, September 19, 2003 Hon. Dan Lamont, Acting J.S.C. presiding

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APPEARANCES:

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HON. ELIOT SPITZER, New York State Attorney General
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NEW YORK CIVIL LIBERTIES UNION FOUNDATION
By: REBEKAH DILLER and ARTHUR EISENBERG, ESQS., of Counsel; and

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
By: JULIE STERNBERG, DIANA KASDAN, and LOUISE MELLING, ESQS., of Counsel for *Amici Curiae* New York Civil Liberties Union and American Civil Liberties Union

DAN LAMONT, J.

Plaintiffs have commenced the instant action for a declaratory judgment challenging the constitutionality of a portion of the Women's Health and Wellness Act ("WHWA") (L 2002, ch 554) which amended certain sections of the Insurance Law to require all group health insurance policies which include prescription drug coverage to include coverage for prescription contraceptives. Eight of the plaintiffs are organizations or corporations affiliated with the Catholic Church which provide various social services to the general public, including healthcare by hospitals and nursing homes, education and training, counseling, housing, disaster relief, and food and shelter for battered women and for the indigent. One of the basic tenets of the Catholic Church is that the use of artificial contraceptives by anyone is sinful and morally wrong. Two of the plaintiffs are independent Baptist Evangelical congregations which provide various social services to the general public including counseling, education, day care and job placement programs for homeless persons. One of the basic tenets of these religious groups is that the use of any contraceptive which acts upon a fertilized egg is sinful and morally wrong. All of the plaintiffs state that their religious beliefs require them to provide their employees with reasonable compensation and a decent standard of living, which they contend includes providing health insurance including prescription drug coverage. Plaintiffs assert that as a result of the WHWA they cannot provide prescription drug coverage to their employees without promoting or facilitating sinful and immoral conduct.

The complaint contains 13 separate causes of action challenging the WHWA under both the New York State Constitution and United States Constitution–claiming violations of the right to free exercise of religion; the proscription on establishment or preference of religion; and the freedom of speech, freedom of association and equal protection clauses.

In addition, the complaint alleges violations of New York's Human Rights Law and Religious Corporations Law, and seeks injunctive relief.

Plaintiffs have moved for a preliminary injunction but have failed to set forth the precise nature of the requested injunctive relief. Defendant has cross-moved for an order granting summary judgment determining that the causes of action contained in the complaint are without merit and dismissing the complaint.

BACKGROUND

The Legislature enacted and the Governor signed the WHWA into law in 2002. The WHWA requires group health insurance policies issued within New York State to increase or provide coverage for mammographies, cervical cytology screening, bone mineral density tests and treatment, and if prescription drugs are covered, to include prescription contraceptive coverage. Passage of the WHWA was delayed by an inability to agree upon the extent and scope of an exemption, if any, for religious employers. The Assembly originally passed a version of the WHWA without any exemption whatsoever. The Senate passed a version containing a broad exemption applicable to any employer "operated, supervised, or controlled by or in connection with a religious organization or denominational group or entity." Such exemption would have been applicable to all of the plaintiffs herein.

As enacted into law, the WHWA contains a limited exemption for religious employers. The WHWA defines a religious employer as an entity whose purpose is the inculcation of religious values; which primarily employs persons who share its religious tenets; which serves primarily persons who share its religious tenets; and which is a nonprofit organization as defined in section 6033(a)(2)(A)(i) or (iii) of the Internal Revenue Code of 1986. The WHWA further provides that if a religious employer chooses to invoke the exemption, it must

give written notice of such fact to its employees, who are entitled to obtain prescription drug coverage from the insurer or health maintenance organization under a rider at the prevailing group rate for such a rider. It appears that this cost is on the order of $1.00 to $2.00 per month.

The legislative history of the WHWA contained in the Assembly Memorandum in Support of Legislation indicates that the WHWA constitutes a comprehensive approach to ending discrimination against women by expanding access by women to vital preventative healthcare. The Senate Introducer's Memorandum in Support states that the WHWA is necessary to provide essential services relating to women's healthcare, and further states that 20 other states require contraceptive coverage as a "necessary health service". The transcript of the Committee on Rules indicates that the Legislature: (1) was concerned with equity and fairness between men and women regarding healthcare coverage; (2) found that women's healthcare costs are considerably higher than men's; and (3) concluded that the WHWA would provide women with healthcare coverage equivalent to men's.

APPLICABLE LEGAL STANDARDS

a) PRELIMINARY INJUNCTIVE RELIEF: The party moving for a preliminary injunction has the burden of demonstrating a likelihood of ultimate success on the merits, irreparable injury absent the granting of the preliminary injunction, and a balancing of the equities in favor of the movant's position (see, CPLR 6301; *Marietta Corp.* v. *Fairhurst*, ___ AD2d ___, 754 NYS 2d 62 [3rd Dept. 2003]; *see also, Aetna Ins. Co.* v. *Capasso*, 75 NY2d 860, 862 [1990]).

b) BURDEN OF PROOF: "[T]he constitutionality of a statute is presumed, and while this presumption is rebuttable, the heavy burden of establishing the contrary beyond a reasonable doubt rests upon the challenger" (*Matter of Klein*, [*Hartnett*], 78 NY2d 662, 666 [1991]; *see also, Lavalle* v.

Hayden, 98 NY2d at 155, 161; *People* v. *Tichenor*, 89 NY2d 769, 773 [1997]). The law also contains "a presumption that the Legislature has investigated and found facts necessary to support the legislation" (*I.L.F.Y. Co.* v. *Temporary State Housing Rent Comm.*, 10 NY2d 263, 269 [1961]). The Court will not sit in review of factual findings which are supported by generally accepted scientific or medical authority (see, *Town of East Hampton* v. *Cuomo*, 179 AD2d 337, 345-346 [2nd Dept, 1992]; see also, *Benson Realty Corp.* v. *Beame*, 50 NY2d 994 [1980]; *Defiance Milk Products Co.* v. *Du Mond*, 309 NY 537, 540-541[1956]).

c) SUMMARY JUDGMENT: The Court may grant summary judgment pursuant to CPLR 3212 if "the cause of action or defense is adequately established so that a court may direct judgment as a matter of law. The movant bears the burden of showing that there are no material issues of fact for trial." (*Igoe* v. *Pataki*, 182 Misc 2d 298, 310-11 [Supreme Ct., N.Y. Co. 1999], *aff'd.* 265 AD2d 151 [1st Dept. 1999], citing, *Winegrad* v. *New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Upon an "as applied" challenge to the constitutionality of a statute, the Court may grant summary judgment where there are no material factual disputes (see, *Igoe, supra* at 311, citing *Andre* v. *Pomeroy*, 35 NY2d 361 [1974]; see also, *Health Services Medical Corp.* v. *Chassin*, 175 Misc. 2d 621, 624 [Supreme Ct., Onondaga Co. 1998], aff'd. 259 AD2d 1053 [4th Dept. 1999]).

DISCUSSION

I. LEGISLATIVE FINDINGS

The legislative history of the WHWA includes findings that prescription contraceptives constitute a necessary and essential component of women's healthcare. The Assembly Memorandum in Support provides: "contraceptives are an essential part of basic healthcare for women. Most fundamentally, contraceptives are necessary to make healthy repro-

ductive choices. Contraceptives also have beneficial ancillary effects, such as reducing the risk of ovarian and uterine cancer." These findings are supported by defendant's submission of an affidavit from a board-certified obstetrician/gynecologist and Dean of The Joseph L. Mailman School of Public Health at Columbia University. Such findings are also supported by the submissions of *amici curiae* the American College of Obstetricians and Gynecologists, New York District, the Medical Society of the State of New York, the American Academy of Pediatrics, the New York State Nurses Association, and the Pharmacists Society of the State of New York.

Plaintiffs in reply have submitted an affidavit from a single board-certified obstetrician-gynecologist which challenges the need for prescription contraceptives. The affidavit and submissions do not show that the affiant's opinions are generally accepted, nor do they indicate that generally accepted medical authority holds prescription contraceptives to be unnecessary. At best they show the existence of a difference of medical opinions on the subject. Plaintiffs have therefore failed to raise an issue of fact with respect to whether prescription contraceptives are necessary to the provision of effective women's healthcare under the "beyond a reasonable doubt" burden of proof.

The legislative history also indicates that the WHWA was enacted to end long-standing discrimination against women in the provision of healthcare services. The Legislature's primary purpose in enacting the provision for prescription contraceptives coverage portion of the WHWA was the elimination of gender discrimination in women's health insurance coverage in an area afforded constitutional protection, i.e., reproductive freedom (see, *Eisenstadt* v. *Baird* 405 US 438 [1972]; and *Griswold* v. *Connecticut* 318 US 479 [1965] [constitutionally protected right of privacy, which encompasses the right to obtain contraceptives]). Plaintiffs have not

submitted any evidence indicating that such gender discrimination has not occurred, and the Legislature's finding is supported by administrative and judicial determinations (see, EEOC Decision on Contraceptive Coverage, <www.eeoc.gov/docs/decision–contraception.html> [last modified December 14, 2000]; *Erickson* v. *Bartell Drug Co.*, 141 F Supp 2d 1266 [WD Wash, 2001]).

II. IMPACT UPON PLAINTIFFS' RELIGIOUS BELIEFS

Plaintiffs have submitted affidavits from theologians and church leaders indicating that the use of contraceptives by anyone is believed to be "intrinsically evil". Plaintiffs have further alleged that such belief constitutes a central tenet of their respective religions. Plaintiffs have also indicated that if they provide their employees with health insurance which includes prescription coverage for contraceptives, they are in complicity with and facilitating sinful conduct–in clear violation of their religious beliefs and teaching. Based upon their religious beliefs in justice and charity, plaintiffs also believe that all employers must provide just wages and benefits to their employees. Plaintiffs allege that this belief requires them to pay adequate wages to their employees and provide full healthcare coverage, including prescription drug coverage. Plaintiffs conclude that the WHWA requires them to violate central religious beliefs by either failing to provide adequate health insurance benefits to their employees or by facilitating evil conduct. Plaintiffs contend that the WHWA thus violates their constitutional rights.

This Court is prohibited from considering the veracity of plaintiffs' claims concerning their religious beliefs and how important such beliefs are to their respective religions (see, *Employment Div., Ore. Dept. of Human Resources* v. *Smith*, 494 US 872, 886-887 [1990]; *Williams* v. *Bright*, 230 AD2d 548, 554 [1st Dept. 1997]). However, nothing prevents the Court from scrutinizing the logical inferences associated with plaintiffs' claims. The prescription contraception coverage

provisions of the WHWA enacted by the Legislature to prohibit discrimination against women during their reproductive years by excluding healthcare vital to their medical needs does *not* require plaintiffs to provide prescription contraceptive coverage to their employees. The WHWA only requires that if an employer chooses to provide employee health insurance coverage with prescription drug coverage, such employer cannot provide prescription drug coverage which discriminates against women by excluding prescription contraceptive coverage.

Plaintiffs make a leap of logic by stating that they *must* provide prescription drug insurance coverage in order to provide adequate compensation to their employees. Plaintiffs have *not* alleged that providing their employees with group health insurance coverage which includes prescription drug coverage is *mandatory* pursuant to their religious tenets. Plaintiffs have therefore failed to establish that the WHWA directly impacts upon their religious beliefs.

Arguably , a similar facilitation of sinful conduct occurs by the mere fact that plaintiffs have paid employees. A portion of the employees' income is subject to income tax, and plaintiffs are required to withhold such taxes and turn them over to the state and federal governments. A portion of such tax revenue is used to fund contraceptives and even abortions for indigent women. Indeed, it has been held that the use of a portion of student registration fees to subsidized student health insurance which provides coverage for abortions does not constitute a significant burden on the free exercise of religion (*Goehring* v. *Brophy*, 94 F3d 1294, 1303 [9th Cir 1996]). It therefore appears that plaintiffs have failed to make a factual showing that the WHWA significantly burdens their religions.

III. PLAINTIFFS' CONSTITUTIONAL CLAIMS

A. FREE EXERCISE OF RELIGION

Plaintiffs contend that the imposition of the requirement to include prescription contraceptives in group health insurance policies which cover prescription drugs violates their right to the free exercise of their religions under both the United States Constitution and the New York State Constitution. It is unclear whether the protection provided by the two constitutions is coextensive.

> "In analyzing whether a statutory requirement violates an individual's constitutional right to the free exercise of religion under the U.S. Constitution, courts historically have applied a balancing test to determine whether a requirement that substantially burdens a religious practice is justified by a compelling governmental interest (*see, Employment Div., Ore. Dept. of Human Resources* v *Smith*, 494 US 872, 882-883, reh. denied 496 US 913; *Sherbert* v *Verner*, 374 US 398, 402-403). That balancing test has been rejected, however, where the requirement is set forth in a neutral law of general applicability, i.e., a law that is not specifically directed at a religious practice and is otherwise valid (*see, City of Boerne* v *Flores*, 521 US 507; *Employment Div., Ore. Dept. of Human Resources* v *Smith, supra*, at 879; *Matter of New York State Empl. Relations Bd.* v *Christ the King Regional High School*, 90 NY2d 244, 248). Thus, 'a generally applicable and otherwise valid enactment, which is not intended to regulate religious conduct or beliefs but which may incidentally burden the free exercise of religion, is not deemed to violate the First Amendment' (*Matter of New York State Empl. Relations Bd.* v *Christ the King Regional High School, supra*, at 248).

> We reach the same conclusion under our analysis of the N.Y. Constitution, which provides: 'The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.' (N.Y. Const., art. I, § 3). The Court of Appeals has not definitively stated whether the scope of that provision is coextensive with the Free Exercise Clause of the First Amendment of the U.S. Constitution, nor has it decided whether the analytical approach adopted by the United States Supreme Court in *Employment Div., Ore. Dept. of Human Resources* v *Smith, supra*, should be applied in resolving claims that N.Y. Constitution, article I, § 3, has been violated." (*Matter of Miller*, 252 AD2d 156, 157-159 [4th Dept. 1998]).

While the Court of Appeals applied the federal test in *Matter of New York State Empl. Relations, Bd.* v. *Christ the King Regional High School*, (*supra*), the decision indicates that only the federal constitutional issue was raised by plaintiff. As such it does not support a claim that the two constitutions are equivalent (*cf. Matter of O'Brien* v *Suffolk County Dept. of Social Servs.*, 261 AD2d 477 [2nd Dept, 1999]; *McGann* v *Incorporated Village of Old Westbury*, 256 AD2d 556 [2nd Dept, 2002]). This Court will therefore address the two constitutions separately.

(1) UNITED STATES CONSTITUTION: Prior to the Supreme Court decision in *Employment Div., Ore. Dept. of Human Resources* v *Smith* (494 US 872, *supra*), the Supreme Court in several cases balanced the burden upon religion against the asserted compelling state interest in the legislation

at issue. In *Smith* the Supreme Court determined that the State of Oregon could apply a statute prohibiting the possession and use of controlled substances to Native Americans who utilized peyote in traditional religious ceremonies or rituals. The Court held that a generally applicable, religion neutral law which has an incidental effect of burdening a particular religious practice or belief is valid and enforceable even in the absence of some compelling governmental interest.

The Women's Health and Wellness Act is clearly generally applicable, as it applies to all group health insurance policies issued in the State of New York. The WHWA also clearly has purely secular purposes—the promotion of public health through increased availability of necessary health services, and the elimination of sexual discrimination against women in matters of healthcare. The WHWA is therefore religion neutral. This Court holds and determines that the general requirement for prescription coverage for contraceptives does not violate any of plaintiffs' rights under the free exercise of religion provision of the United States Constitution.

(2) NEW YORK STATE CONSTITUTION: Both before and after the *Smith* decision, New York courts have applied a test balancing the burden on the free exercise of religion with the compelling governmental interest in religion neutral laws of general application. In 1918, it was held that the interest in protecting the peace and safety of the community was sufficient to warrant criminal prosecution for fortune telling, which the defendant claimed constituted the practice of her religion (*People* v *Ashley*, 184 App Div 520 [2nd Dept]). In 1966, it was held that the state's interest in prosecuting crimes to protect the community outweighed a person's claimed religious right to refrain from giving grand jury testimony which would be harmful to others (*People* v *Woodruff*, 26 AD2d 236 [2nd Dept]). In 1971, it was held that a parent's religious beliefs concerning medical treatment must give way to the state's interest in the health and well

being of a child (*Matter of Sampson*, 37 AD2d 668 [3rd Dept.]). In 1975, the Court of Appeals held that the religious interest of an attorney in wearing clerical garb was outweighed by the government's interest in assuring a fair and impartial trial (*La Rocca* v *Lane*, 37 NY2d 575). In 1984, the Court of Appeals held that the religious interests of a Muslim prisoner outweighed the state's interest in having female correctional officers perform frisks (*Matter of Rivera* v *Smith*, 63 NY2d 501). Following *Smith* in 1994, it was held that a Native American's religious beliefs favoring long hair outweighed the minimal governmental interest in having male correctional officers have short hair (*Matter of Rourke* v *New York State Dept. of Correctional Servs.*, 201 AD2d 179 [3rd Dept. 1994]). In 1998, the Court of Appeals held that the lower court should have balanced the defendant's religious interest in keeping live chickens in his home against the governmental interest in zoning and land use control (*People ex rel. DeMauro* v *Gavin*, 92 NY2d 963).

The State's interests in the WHWA involve promoting public health by providing necessary healthcare for women and ending discrimination in employment benefits for women. Legislation furthers a compelling interest if it "furthers an important or substantial governmental interest" (*U.S.* v *O'Brien*, 391 US 367, 377 [1968]). A compelling interest has been found in the general protection of the community, (*People* v *Woodruff*, 26 AD2d 236, *supra; People* v *Ashley*, 184 App Div 520, *supra*), meeting the medical needs of the community or individuals, (*People* v. *Pierson*, 176 NY 201, [1903]; *Goehring* v *Brophy*, 94 F3d 1294, *supra*), and ending discrimination against women, (*Board of Directors of Rotary Intern.* v *Rotary Club of Duarte* 481 US 537 [1987]; *Roberts* v *U.S. Jaycees* 468 US 609 [1984]). Therefore, even if it were determined that the WHWA imposes a substantial burden upon the plaintiffs' religions, the State's compelling secular interests are sufficient to uphold the WHWA's constitutionality.

It is also noted that the California statute upon which the New York law was modeled was upheld by a California appellate court in the face of similar challenges by a California Catholic Charities Organization (see, *Catholic Charities of Sacramento, Inc.* v *Superior Court*, 109 Cal Rptr 2d 176 [Ct of Appeal, 3rd Dist., 2001]). The wording of the relevant portions of both the California statute and the California Constitution are essentially identical to their New York counterparts. The Court finds such opinion well reasoned and persuasive. Plaintiffs object to the consideration of such opinion because under the California Rules of Court, the opinion may not be cited due to the pendency of an appeal to the California Supreme Court. The California rules are extremely restrictive as to what decisions may be published and cited. Only lower appellate court decisions which involve novel issues may be published and cited and the grant of review by the Supreme Court automatically supersedes the opinion and prohibits citation (Rules 976, 977). However, it does not appear that these rules are applicable to New York courts. The California opinion is clearly not binding upon our courts. Rather, such opinion is cited to show that an appellate court of a sister state has determined an issue in a particular fashion (see, *e.g. People* v. *Moore*, 46 NY2d 1[1978]; *Tallini* v. *Martino & Son*, 88 AD2d 1090 [3rd Dept. 1982]). The fact that the determination is under appeal goes to its weight, and should not preclude its consideration or citation. Indeed, a California federal court has cited the California case following grant of review (*Barnes-Wallace* v *Boy Scouts of America*, 275 F Supp 2d 1259, 1277 [SD Cal, 2003]).

This Court holds and determines that the Women's Health and Wellness Act does not violate any of the plaintiffs' rights to the free exercise of religion under the New York State Constitution.

B. ESTABLISHMENT/PREFERENCE OF RELIGION

Plaintiffs allege that the exemption for religious employers was specifically designed to target Catholic Church affiliated employers while exempting essentially all other religious denominations. Plaintiffs have stated that their religions command that their beliefs be expressed through conduct, as well as speech. As such, the Catholic Church and the Baptist congregations believe that they must provide assistance in the nature of healthcare, education, housing, and similar services to the needy of all faiths and beliefs. Plaintiffs contend that they are the only religious groups which follow this command on a wide scale, and that the exemption–which is limited to employers whose purpose is the inculcation of religious values, and who primarily employ *and* serve persons who share their religious tenets—therefore discriminates against them, thereby preferring other religions.

It appears that the state and federal constitutions provide equivalent protections under the prohibitions against establishment or preference of religion (*see., Grumet* v *Pataki*, 93 NY2d 677[1999]; *Matter of Lewis* v *Allen*, 11 AD2d 447, 451; *aff'd* 14 NY2d 867[1964]). The Court of Appeals has eloquently set forth the general principles applicable to establishment clause cases:

> "The Establishment Clause of the First Amendment states that 'Congress shall make no law respecting an establishment of religion' (U.S. Const. 1st Amend.). These first words of the Bill of Rights, ratified just over 200 years ago, have deep roots in this Nation's history of religious freedom, diversity and tolerance. The evolution of the Establishment Clause has been traced fully in several United States Supreme Court decisions (*see, Engel* v *Vitale*, 370 U.S. 421, 425-430; *Everson* v *Board of Educ.*, 330 U.S. 1, 8-14; *see also, Edwards* v *Aguillard*, 482 U.S. 578, 605[Powell, J., concurring]; *Wallace* v *Jaffree*, 472 U.S. 38, 93-106[Rehnquist, J.,

dissenting]). *Everson* v *Board of Educ.* (*supra*) summarizes the 'essential precepts' of the Establishment Clause, which applies to the States under the Fourteenth Amendment, as follows:

'The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence * * * person[s] to go to or remain away from church against [their] will or force [them] to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.' (330 US 1, 15-16, supra.)

The Establishment Clause, then, has emerged as 'more than a pledge that no single religion will be designated as a state religion * * * [or] a mere injunction that governmental programs discriminating among religions are unconstitutional. * * * [I]nstead, [it] primarily proscribes "sponsorship, financial support, and active involvement of the sovereign in religious activity.'" (*Grand Rapids School Dist.* v *Ball*, 473 US 373, 381). In recent years, the United States Supreme Court has recognized that total separation between government and any governmental acknowledgment of the role of religion in citizens' lives is not possible or desirable, and would in fact exhibit hostility rather than a constitutionally correct neutrality towards religion (*see, Lynch* v

> *Donnelly*, 465 US 668, 672-673; *Lemon* v *Kurtzman*, 403 US 602, 614, *supra; see also, Allegheny County* v *Greater Pittsburgh Am. Civ. Liberties Union*, 492 US 573, 623[O'Connor, J., concurring]; *Aguilar* v *Felton*, 473 US 402, 420[Burger, Ch. J., dissenting]). Thus, in general, and especially on a facial challenge, so long as the government 'maintain[s] a course of neutrality among religions, and between religion and nonreligion' (*Grand Rapids School Dist.* v *Ball*, 473 US 373, 382, *supra*), its actions will withstand Establishment Clause scrutiny." (*New York State School Bds. Assn.* v *Sobol* 79 NY2d 333, 337-338 [1992]).

Therefore, legislation which may accommodate religion and religions "by alleviating special burdens will not have the primary effect of advancing religion so long as the secular effect of the statute is sufficiently separable from its religious impact and the class benefitted by the statute is sufficiently broad" (*Grumet* v *Pataki*, 93 NY2d 677, 695, *supra*). In addition, legislation must be both facially neutral and have a neutral impact upon religions.

In *Larson* v *Valente*, (456 US 228 [1982]), the Supreme Court reviewed Minnesota legislation which required charitable organizations to register with the state and to provide significant financial disclosure. The statute was generally intended to protect the public from fraudulent practices by charitable organizations. For many years the statute had provided an exemption for all religious organizations. However, the statute was amended to limit the religious organization exemption to organizations which received at least half of their contributions from members. The Supreme Court found that the legislative history indicated that the legislation was specifically intended to remove the exemption for the Unification Church, while maintaining the exemption for all of the remaining, more established, churches in the state. Indeed, the Minnesota legislature had made specific

changes in the language of the exemption because an early draft would have excluded the Catholic Church from the exemption. The Court struck down the statute as violative of the establishment clause. Plaintiffs contend that the WHWA challenged herein is indistinguishable from the statute involved in *Larson*.

The Supreme Court in *Larson* held that when legislation grants denominational preferences it is subject to strict scrutiny. The legislation must be justified by a compelling governmental interest and it must be "closely fitted to further that interest" (*Larson*, p 247). Plaintiffs claim that the WHWA grants a denominational preference in that only plaintiffs' religions have affiliated employers which do not qualify for the exemption. It is noted, however, that the Catholic Church does qualify for the exemption and is not a party plaintiff. It is only the affiliated organizations, which employ large numbers of persons of various other faiths and beliefs, which do not qualify. It is therefore doubtful whether the WHWA contains a denominational preference. Even if it were determined that such preference existed, it has already been determined that the WHWA is justified by at least two compelling governmental interests.

Plaintiffs argue that the WHWA is not closely tailored to further such interests because it does not apply to unemployed or uninsured women. This argument does not even apply to the eliminating of gender discrimination purpose. The WHWA is clearly closely fitted to ending gender based discrimination in one of the main benefits of employment—group health insurance. Moreover, the requirement that legislation be closely fitted to the governmental interests does not require that there be no conceivable alternative which is less restrictive. It is only required that the governmental interest would be achieved less effectively without the legislation (*see, U.S.* v *Albertini*, 472 US 675, 689 [1985]).

This Court determines that the WHWA is in fact closely fitted to the purposes of improving healthcare for women and ending discrimination against women in health insurance coverage. The religious employers who qualify for the exemption must by definition oppose the use of contraceptives and primarily employ persons who share such belief. It is therefore unlikely that a significant number of such employees would take advantage of the increased benefit or object to the gender discrimination. However, employers which employ large numbers of persons of different faiths and beliefs do not qualify for the exemption. Indeed the record shows that Catholic affiliated secular health businesses employ over 50,000 persons, with health insurance coverage provided to as many as 500,000. The narrow exemption serves to protect the rights and health of large numbers of employees who do not share their employer's religious views, while exempting those employers whose employees do share their employer's religious views, and therefore don't believe in or want prescription contraceptive coverage. Expanding the exemption would certainly reduce the effectiveness of the WHWA in meeting its legitimate governmental purposes.

The WHWA is thus distinguishable from the legislation invalidated in *Larson* as the Supreme Court found that the justifications for such legislation were without merit and failed to further the asserted purpose of protecting the public from fraudulent practices by charitable organizations. The WHWA is also clearly distinguishable from *Church of Lukumi Babalu Aye* v *City of Hialeah*, (508 US 520 [1993]). In that case, the city passed legislation to bar religious animal sacrifice. The legislative history indicated that the law was intended to apply only to the religious practices of a specific African Cuban religion. It did not prohibit Kosher religious slaughter of animals, hunting, euthanasia, or any other form of killing animals. The Court found that the law was not closely fitted to its purported purposes, to prevent animal cruelty and to promote public health.

Prior to its decision in *Larson*, the Supreme Court set forth a three part test for compliance with the establishment clause. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v *Allen*, 392 US 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' *Walz, supra*, at 674." (*Lemon* v *Kurtzman*, 403 US 602, 612-613 [1971]). Plaintiffs contend that the WHWA does not have a secular purpose because the exemption is phrased in religious terms and has religious purposes. However, the purposes of the WHWA as a whole are clearly secular. The fact that the religious exemption involves religion is inevitable and does not render the WHWA or the exemption invalid. "Under the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." (*Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v *Amos*, 483 US 327, 335 [1987]). This Court determines that the exemption has a valid secular purpose of accommodating religion, while minimizing the number of secular employees who are subjected to their employer's contrary religious beliefs.

Plaintiffs also contend that the WHWA's primary effect inhibits their religion. Plaintiffs allege that the legislative history shows an intent to burden only the Catholic Church's affiliated organizations. However, the legislative history overwhelmingly establishes that the secular purposes of promoting women's health and ending gender discrimination were the only issues considered. The fact that the Catholic Church was the only entity which aggressively objected to the legislation does not demonstrate any animus towards that Church. Moreover, as indicated above, the WHWA does not substantially burden the plaintiffs' free exercise of their religion. Therefore, the primary effect is not the inhibition of plaintiffs' religions.

Plaintiffs also claim that application of the exemption test to determine whether an organization is primarily secular or religious will involve excessive entanglement with religion. The qualifying criteria do not appear to be ambiguous as the record indicates that all of the plaintiffs have been able to determine that they do not qualify for the exemption. There is also no indication that the defendant will not accept an applicant's statements concerning its religious tenets and whether those whom it primarily employs and those whom it primarily serves share such religious tenets. Moreover, the determination of whether an entity is primarily religious or secular is routinely made and is clearly constitutional (see, *Bowen* v *Kendrick*, 487 US 589 [1988]; *Roemer* v *Board of Public Works of Maryland*, 426 US 736 [1976]; *Matter of Jones*, 260 AD2d 969, [3rd Dept, 1999]; *Matter of Faith Bible Churc*h, 179 AD2d 308 [3rd Dept, 19921). This Court therefore holds and determines that the Women's Health and Wellness Act does not constitute an unconstitutional establishment or preference of religion under the New York State or United States Constitutions (see, *Catholic Charities of Sacramento, Inc.* v *Superior Court*, 109 Cal Rptr 2d 176, *supra*).

C. FREEDOM OF SPEECH

"It is well settled that freedom of speech embodies the right to receive information and ideas, regardless of their social worth; the right to utter, print and distribute" (*Matter of Figari* v *New York Tel. Co.*, 32 AD2d 434, 441[2nd Dept, 1969]). Nothing in the Women's Health and Wellness Act prevents the plaintiffs from engaging in any form of expressive communication, nor does it require that the plaintiffs inform their employees of the availability of coverage for contraceptive prescriptions. It does not require that plaintiffs fund any sort of expressive conduct with which they disagree (*cf. Keller* v *State Bar of California*, 496 US 1 [1990]). The only requirement relating in any way to speech or expressive conduct is the requirement that if an exemption is granted, an

employer must inform its employees of the contraceptive services which are not covered under the employer's health-care plan. This Court therefore holds and determines that the Women's Health and Wellness Act does not violate the plaintiffs' rights to freedom of speech under the New York State or United States Constitutions (see, *Catholic Charities of Sacramento, Inc.* v *Superior Court, supra*).

D. FREEDOM OF ASSOCIATION

Plaintiffs contend that the WHWA also violates their rights to freedom of association. "Freedom of association 'includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it' and is within the penumbra of the First Amendment" (*Matter of Figari* v *New York Tel. Co., supra*, p 441). Plaintiffs have failed to show that the WHWA imposes any restrictions whatsoever upon their rights to join or be affiliated with any group. In any event, the governmental interest in preventing sexual discrimination in the workplace is sufficient to overcome any rights to freedom of association (*Board of Directors of Rotary Intern.* v *Rotary Club of Duarte*, 481 US 537, *supra; Roberts* v. *U.S. Jaycees*, 468 US 609, *supra*). This Court therefore holds and determines that the Women's Health and Wellness Act does not violate the plaintiffs' rights to freedom of association under the New York State or United States Constitutions.

E. EQUAL PROTECTION

Plaintiffs allege: (1) that the exemption was narrowly drawn as a result of legislative animosity toward the Catholic Church; (2) that the basis for the distinction between organizations was purely religious, rather than secular; and (3) that the exemption was tailored to target specific Catholic institutions, in violation of the plaintiffs' rights to equal protection of the laws. This Court has determined that there is no evidence of animosity toward the Catholic Church and further

that the extent of the exemption was based upon secular grounds in an attempt to balance the rights of religious groups operating secular businesses with the rights of their secular employees. This Court has also determined that the exemption bears a rational relation to a legitimate governmental interest which is sufficient to withstand an equal protection challenge (see, *Matter of Klein* [*Hartnett*], 78 NY2d 662, *supra*). Moreover, plaintiffs have failed to show that any similarly situated groups have been treated in a different fashion. It appears from the face of the statute that the exemption excludes employers of any religious faith who are not primarily involved in the inculcation of religious values and employing and serving those of similar beliefs. Indeed, twenty per cent of the plaintiffs are not Catholic.

This Court therefore holds and determines that the Women's Health and Wellness Act does not violate the plaintiffs' rights to equal protection under the fourteenth amendment of the United States Constitution.

F. HYBRID RIGHTS

The Supreme Court in *Employment Div., Ore. Dept. of Human, Resources* v *Smith*, (494 US 872, *supra*), indicated that some heightened scrutiny might be warranted when governmental action implicated both the free exercise of religion and some other fundamental constitutional right such as freedom of speech. Plaintiffs contend that the Women's Health and Wellness Act involves such a hybrid situation. However, this Court has determined that plaintiffs' claims under freedom of speech and association and equal protection are without merit. Plaintiffs may not bootstrap their free exercise claims to some higher standard by alleging other non-meritorious constitutional claims. It is therefore determined that plaintiffs' hybrid rights claim is without merit. In any event, the free exercise claims have been determined to be without merit even under the highest scrutiny.

IV. PLAINTIFFS' STATUTORY CLAIMS

A. HUMAN RIGHTS LAW

Plaintiffs allege that the Human Rights Law, at Executive Law §296(11), evidences a legislative intent to preempt the entire field of employer-employee relations concerning religious employers. Indeed, the statute does allow some discrimination by religious groups with respect to hiring those persons and providing housing accommodations to those persons who share its religious beliefs. However, by the very terms of the statute, religious groups are only exempted from the terms of that particular section of the Human Rights Law. They are not given a license to discriminate with respect to anything other than the specifically authorized issues (*see, Scheiber* v *St. John's University*, 84 NY2d 120, 126-127 [1994]), nor is there any evidence that the legislature intended the Human Rights Law to govern the provision of group health insurance or necessary healthcare. This Court holds and determines that the Women's Health and Wellness Act does not violate the Human Rights Law.

B. RELIGIOUS CORPORATIONS LAW

Plaintiffs claim that Religious Corporations Law §§5 and 26 subordinate the laws of the State to the 'laws, regulations, practice, discipline, rules and usages" of the various religious denominations. Plaintiffs further claim that the WHWA impermissibly defines religion and exceeds the permissible level of regulation of religious organizations. "The primary purpose of the Religious Corporations Law is to provide an orderly method for the administration of the property and temporalities dedicated to the use of religious groups, and to preserve them from exploitation by those who might divert them from the true beneficiaries of the corporate trust." (*Morris* v *Scribner*, 69 NY2d 418, 423 [1987]). There is no indication that the Religious Corporations Law was intended to limit other laws of general applicability which might incidentally impact religions or churches. Religious Corpora-

tions Law §26 on its face is limited to the provisions of the Religious Corporations Law, and merely prohibits any "fixing or changing of the times, nature or order of public or social or other worship***". Contrary to plaintiffs' contentions, it does not appear that the WHWA defines religion in any way. The WHWA merely contains a workable test for determining whether an organization is primarily religious or primarily secular. This Court therefore holds and determines that the Women's Health and Wellness Act does not violate the Religious Corporations Law.

CONCLUSION

This Court holds and determines that the defendant's motion for summary judgment should be and the same is hereby granted, and that the Complaint is hereby dismissed. This Court hereby determines and declares that the Women's Health and Wellness Act does *not* violate any of the plaintiffs' constitutional rights under the United States Constitution or the New York State Constitution, nor does it violate any New York State law. The plaintiffs' motion for a preliminary injunction is thereby rendered moot and is hereby denied.

This Memorandum shall constitute both the Decision and Order of the Court. All papers, including this *DECISION/ ORDER*, are being returned to the defendant's attorneys. The signing of this *DECISION/ORDER* shall *not* constitute entry or filing under CPLR § 2220. Legal counsel are *not* relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

Dated: Albany, New York
November 25, 2003

ENTER

/s/ Dan Lamont
DAN LAMONT, Acting J.S.C.

cc: Michael L. Costello, Esq.
Nancy G. Groenwegen, Esq.
A. Stephen Hut, Jr., Esq.
Eve C. Gartner, Esq.
Anthony J. Vlatas, Esq.
Rebekah Diller, Esq.
Julie Sternberg, Esq.

Papers considered:

1. Notice of Motion dated February 21, 2003;
2. Affidavit of Michael L. Costello, Esq. with exhibits A-X dated February 20, 2003.
3. Request for Judicial Notice dated February 21, 2003.
4. Affidavit of Richard E. Barnes with exhibits A-F dated February 19, 2003.
5. Affidavit of Sr. Helen Ann Charlebois, IHM dated February 20, 2003.
6. Affidavit of Duke Hergatt dated February 19, 2003.
7. Affidavit of George Grace dated February 18, 2003.
8. Affidavit of Mother Marie Edward, O.P. with exhibits A-B dated February 19, 2003.
9. Affidavit of Sr. Maureen Joyce, RSM with exhibits A-E dated February 18, 2003.
10. Affidavit of John C. Sansoucy with exhibits A-B dated February 18, 2003.
11. Affidavit of Sr. M. Veronica Robert, O. Carm. with exhibits A-C dated February 19, 2003.
12. Affidavit of Bernadette Harlan with exhibits A-B dated February 19, 2003.

13. Affidavit of Dennis J. Verzi with exhibits A-B dated February 18, 2003.

14. Affidavit of Reverend Monsignor Otto L. Garcia with exhibits A-B dated February 19, 2003.

15. Affidavit of John J. Strynkowski with exhibits A-B dated February 14, 2003.

16. Affidavit of Daniel P. Sulmasy, OFM with exhibits A-D dated February 18, 2003.

17. Affidavit of Howard J. Hubbard with exhibits A-B dated February 19, 2003.

18. Plaintiffs' Memorandum of Law dated February 21, 2003.

19. Notice of Cross-Motion for Summary Judgment dated April 15, 2003.

20. Verified Answer dated April 14, 2003.

21. Affirmation of Nancy G. Groenwegen, Esq. with exhibits 1-6 dated April 14, 2003.

22. Affidavit of Thomas C. Zyra with exhibit 1 dated April 15, 2003.

23. Affidavit of Allan Rosenfield, M.D. with exhibits 1-6 dated April 1, 2003.

24. Affidavit of Joann M. Smith with exhibits 1-12 dated April 2, 2003.

25. Defendant's Memorandum of Law dated April 14, 2003.

26. Reply Affirmation of Michael L. Costello, Esq. with exhibit A dated June 16, 2003.

26. Reply Affidavit of Sr. M. Veronica Robert O. Carrn. with exhibits A-E dated June 13, 2003.

28. Reply Affidavit of Sr. Maureen Joyce, RSM with exhibits A-F dated June 13, 2003.

29. Reply Affidavit of Dennis Poust with exhibits A-B dated June 12, 2003.

30. Affidavit of Hanna Klaus, M.D. with exhibits 1-7 dated June 11, 2003.

31. Supplemental Affidavit of Mother Marie Edward, O.P. with exhibits A-C dated September 10, 2003.

32. Plaintiffs' Reply Memorandum of Law dated June 16, 2003.

33. Defendant's Reply Memorandum of Law dated July 21, 2003.

34. Sur-Reply Affidavit of Michael L. Costello, Esq. with exhibits A-1–A-3 dated August 11, 2003.

35. Plaintiffs' Sur-Reply Memorandum of Law dated August 11, 2003.

36. Defendant's Sur-Sur-Reply Memorandum of Law dated August 22, 2003.

37. Memorandum of Law of *Amici Curiae* American College of Obstetricians and Gynecologists *et al* dated August 21, 2003.

38. Memorandum of Law of *Amici Curiae* American Jewish Congress et al with exhibits A-E dated August 21, 2003.

39. Memorandum of Law of *Amicus Curiae* The Becket Fund for Religious Liberty dated August 22, 2003.

40. Memorandum of Law of *Amici Curiae* New York Civil Liberties Union *et ano*, undated.

APPENDIX E

STATE OF NEW YORK
[LOGO] COURT OF APPEALS

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207-1095

DECISION February 20, 2007

Mo. No. 1304

CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY *et al.*,
Appellants,

v.

GREGORY V. SERIO, as Superintendent of Insurance,
Respondent.

Motion for reargument denied.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the court, held at Court of Appeals Hall in the City of Albany on the twentieth day of February, 2007

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 1304

CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY *et al.*,
Appellants,

v.

GREGORY V. SERIO, as Superintendent of Insurance,
Respondent.

A motion for reargument to the Court of Appeals in the above cause having been heretofore made upon the part of appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/ Stuart M. Cohen
STUART M. COHEN
Clerk of the Court

APPENDIX F

N.Y. Ins. Law § 3221(*l*)(16) (McKinney 2006 & Supp. 2007)

(16) Every group or blanket policy which provides coverage for prescription drugs shall include coverage for the cost of contraceptive drugs or devices approved by the federal food and drug administration or generic equivalents approved as substitutes by such food and drug administration under the prescription of a health care provider legally authorized to prescribe under title eight of the education law. The coverage required by this section shall be included in policies and certificates only through the addition of a rider.

(A) Notwithstanding any other provision of this subsection, a religious employer may request a contract without coverage for federal food and drug administration approved contraceptive methods that are contrary to the religious employer's religious tenets. If so requested, such contract shall be provided without coverage for contraceptive methods. This paragraph shall not be construed to deny an enrollee coverage of, and timely access to, contraceptive methods.

(1) For purposes of this subsection, a "religious employer" is an entity for which each of the following is true:

(a) The inculcation of religious values is the purpose of the entity.

(b) The entity primarily employs persons who share the religious tenets of the entity.

(c) The entity serves primarily persons who share the religious tenets of the entity.

(d) The entity is a nonprofit organization as described in Section 6033(a)(2)(A)i or iii, of the Internal Revenue Code of 1986, as amended.

(2) Every religious employer that invokes the exemption provided under this paragraph shall provide written notice to

prospective enrollees prior to enrollment with the plan, listing the contraceptive health care services the employer refuses to cover for religious reasons.

(B)(i) Where a group policyholder makes an election not to purchase coverage for contraceptive drugs or devices in accordance with subparagraph (A) of this paragraph each certificateholder covered under the policy issued to that group policyholder shall have the right to directly purchase the rider required by this paragraph from the insurer which issued the group policy at the prevailing small group community rate for such rider whether or not the employee is part of a small group.

(ii) Where a group policyholder makes an election not to purchase coverage for contraceptive drugs or devices in accordance with subparagraph (A) of this paragraph, the insurer that provides such coverage shall provide written notice to certificateholders upon enrollment with the insurer of their right to directly purchase a rider for coverage for the cost of contraceptive drugs or devices. The notice shall also advise the certificateholders of the additional premium for such coverage.

(C) Nothing in this paragraph shall be construed as authorizing a group or blanket policy which provides coverage for prescription drugs to exclude coverage for prescription drugs prescribed for reasons other than contraceptive purposes.

(D) Such coverage may be subject to reasonable annual deductibles and coinsurance as may be deemed appropriate by the superintendent and as are consistent with those established for other drugs or devices covered under the policy.

APPENDIX G

N.Y. Ins. Law. § 4303(cc) (McKinney 2007)

(cc) Every contract which provides coverage for prescription drugs shall include coverage for the cost of contraceptive drugs or devices approved by the federal food and drug administration or generic equivalents approved as substitutes by such food and drug administration under the prescription of a health care provider legally authorized to prescribe under title eight of the education law. The coverage required by this section shall be included in contracts and certificates only through the addition of a rider.

(1) Notwithstanding any other provision of this subsection, a religious employer may request a contract without coverage for federal food and drug administration approved contraceptive methods that are contrary to the religious employer's religious tenets. If so requested, such contract shall be provided without coverage for contraceptive methods. This paragraph shall not be construed to deny an enrollee coverage of, and timely access to, contraceptive methods.

(A) For purposes of this subsection, a "religious employer" is an entity for which each of the following is true:

(i) The inculcation of religious values is the purpose of the entity.

(ii) The entity primarily employs persons who share the religious tenets of the entity.

(iii) The entity serves primarily persons who share the religious tenets of the entity.

(iv) The entity is a nonprofit organization as described in Section 6033(a)(2)(A)i or iii, of the Internal Revenue Code of 1986, as amended.

(B) Every religious employer that invokes the exemption provided under this paragraph shall provide written notice to

prospective enrollees prior to enrollment with the plan, listing the contraceptive health care services the employer refuses to cover for religious reasons.

(2)(A) Where a group contractholder makes an election not to purchase coverage for contraceptive drugs or devices in accordance with paragraph one of this subsection, each enrollee covered under the contract issued to that group contractholder shall have the right to directly purchase the rider required by this subsection from the insurer or health maintenance organization which issued the group contract at the prevailing small group community rate for such rider whether or not the employee is part of a small group.

(B) Where a group contractholder makes an election not to purchase coverage for contraceptive drugs or devices in accordance with paragraph one of this subsection, the insurer or health maintenance organization that provides such coverage shall provide written notice to enrollees upon enrollment with the insurer or health maintenance organization of their right to directly purchase a rider for coverage for the cost of contraceptive drugs or devices. The notice shall also advise the enrollees of the additional premium for such coverage.

(3) Nothing in this subsection shall be construed as authorizing a contract which provides coverage for prescription drugs to exclude coverage for prescription drugs prescribed for reasons other than contraceptive purposes.

(4) Such coverage may be subject to reasonable annual deductibles and coinsurance as may be deemed appropriate by the superintendent and as are consistent with those established for other drugs or devices covered under the policy.

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(3)

No. 06-1550

Supreme Court, U.S.
FILED
JUL 2 3 2007
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CATHOLIC CHARITIES OF
THE DIOCESE OF ALBANY, *et al.*,

Petitioners,

v.

ERIC R. DINALLO, SUPERINTENDENT,
NEW YORK STATE INSURANCE DEPARTMENT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), forecloses employers' free exercise challenge to a state insurance law that regulates the content of group health insurance plans, where the insurance law is generally applicable and does not target religion?

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STATUTES

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Act of September 17, 2002, ch. 554,
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STATEMENT

1. The New York Legislature enacted the Women's Health and Wellness Act ("WHWA")[1] in 2002 to redress persistent gender inequities in health insurance coverage and expand access to vital preventive healthcare. (Pet. App. 2a, 71a).[2] The Act requires group health insurance policies issued within New York State to provide health insurance coverage for a variety of services needed by women, including obstetric and gynecologic care, periodic mammography, cervical cytology screening, bone density tests and treatment, and if prescription drug coverage is included, the cost of prescription contraceptive drugs and devices. (Pet. App. 2a, 19a, 70a).

The Legislature was provided with extensive information demonstrating the need for the legislation, including the provision relating to contraception. (Pet. App. 2a). *See* N.Y. Ins. Law §§ 3221(l)(16), 4303(cc). It concluded that the WHWA was necessary to ensure women's access to essential healthcare services, and "would provide women with healthcare coverage equivalent to men's." (Pet. App. 71a).

The Legislature sought to advance its compelling interest in gender equity and women's health while accommodating the beliefs of religious organizations. It did so by providing a statutory exemption for "religious employers" that permits them to request a group policy without contraceptive coverage if contraceptive use is contrary to the tenets of their faith. N.Y. Ins. Law §§ 3221(l)(16)(A), 4303(cc)(l). When a religious employer invokes the exemption, the insurer

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1. Act of September 17, 2002, ch. 554, 2002 N.Y. Laws 3458.

2. "Pet." refers to the Petition for Writ of Certiorari in this case; "Pet. App." refers to the Appendix to the Petition; "R." refers to the record filed with the New York Court of Appeals.

must offer individual employees the opportunity to purchase contraception coverage at their own expense "at the prevailing small group community rate." *Id.* §§ 3221(l)(16)(B)(I), 4303(cc)(2)(A). The Act defines a "religious employer" as an entity for which each of the following is true:

> (a) The inculcation of religious values is the purpose of the entity.
>
> (b) The entity primarily employs persons who share the religious tenets of the entity.
>
> (c) The entity primarily serves persons who share the religious tenets of the entity.
>
> (d) The entity is a non-profit organization as described in Section 6033(a)(2)(A)i or iii, of the Internal Revenue Code of 1986, as amended.

Id. §§ 3221(l)(16)(A)(1), 4303(cc)(1)(A).

2. Petitioners are ten organizations or corporations affiliated with the Roman Catholic Church or the Baptist Bible Fellowship who object to the contraception coverage provision in the WHWA. (Pet. App. 3a). Petitioners provide social and educational services to the general public, including immigration resettlement programs, affordable housing programs, job development services, domestic violence shelters, healthcare facilities, disaster relief programs, job placement and homeless services, and schools. (Pet. App. 4a, 69a). The religious tenets of petitioner organizations hold some or all forms of contraception to be sinful, and require petitioners "to provide their employees with reasonable compensation and a decent standard of

living, which they contend includes providing health insurance including prescription drug coverage." (Pet. App. 69a).

It is uncontested that nine of the petitioners do not quality for the WHWA's religious employer exemption for one or more reasons.[3] Some do not have the inculcation of religious values as their purpose. Some do not primarily employ persons who share their religious tenets. None of the petitioners serve primarily persons who share their religious tenets. And only three qualify under the designated Internal Revenue Code provision. (Pet. App. 4a).

3. Dissatisfied with the statute the New York Legislature chose to enact, petitioners filed an action for declaratory and injunctive relief in New York Supreme Court, Albany County. Petitioners asserted that the provision as applied to them violates their Free Exercise Clause, Establishment Clause, and freedom of speech and association rights under the federal and state constitutions, their right to equal protection under the federal constitution, and their rights under certain state statutes. (Pet. App. 90a).[4]

By order dated November 25, 2003, the New York trial court denied petitioners' motion for injunctive relief and granted the State's motion for summary judgment, dismissing all claims. (Pet. App. 67a-91a). Petitioners appealed, and the Appellate Division and Court of Appeals both affirmed. (Pet. App. 1a-15a, 18a-66a).

---

3. The tenth petitioner, the Servants of Relief for Incurable Cancer, applied for and was granted an exemption while this case was pending, *see* Pet. 8 n.5 (R. 1482-90), and thus no longer has standing to pursue this action.

4. At this stage, petitioners assert only their free speech and association and free exercise claims under the federal constitution. (Pet. 11-27).

In a unanimous decision, the New York Court of Appeals held that *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), barred petitioners' federal free exercise claim. As the court explained, *Smith* unambiguously established that "'the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (Pet. App. 5a (quoting *Smith*, 494 U.S. at 879)). The court went on, "where a prohibition on the exercise of religion 'is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.'" (Pet. App. 6a (quoting *Smith*, 494 U.S. at 878)).

Smith foreclosed petitioners' free exercise challenge to the contraceptive coverage provision, the court held, because the WHWA is a neutral law designed not to target religion, but to expand the insurance coverage available to women. The court rejected petitioners' argument that the religious employer exemption rendered the WHWA not neutral. It explained that the neutral purpose of the challenged provision – to improve women's health and eliminate gender inequity – is not altered simply because the Legislature also sought to accommodate religious practice. (Pet. App. 6a).

The court also rejected petitioners' attempts to find an exception to *Smith* that would save their claim. The court assumed, without deciding, that petitioners' so-called "hybrid-rights" exception to *Smith* could state a cognizable First Amendment claim. Their hybrid rights theory would hold that a neutral, generally applicable law can nonetheless be deemed unconstitutional as applied to a religious practice where a First Amendment principle in addition to free exercise is at stake. But the court refused to apply such a doctrine to invalidate the law at issue here, because petitioners had not alleged any plausible First Amendment

violation beyond their free exercise claim. It found petitioners' free speech and association claims to be "insubstantial," since the WHWA "does not interfere with [petitioners'] right to communicate, or to refrain from communicating, any message they like; nor does it compel them to associate, or prohibit them from associating, with anyone" they chose. (Pet. App. 8a (citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 126 S.Ct. 1297 (2006) ("FAIR")).

The court went on to reject petitioners' attempt to avoid *Smith* through reliance on the church autonomy doctrine. The court held that "church autonomy" was not at issue because the WHWA does not involve the State in deciding internal matters of church governance or ecclesiastical questions; it merely regulates one aspect of the employment relationship between petitioners and their lay staff without deciding whom a church will employ to carry out its religious mission. (Pet. App. 8a-9a).

The court also rejected petitioners' state constitutional claims, finding that the WHWA satisfied even the more rigorous scrutiny applicable under the state free exercise clause. (Pet App. 9a-14a). In order to satisfy the free exercise clause of the New York State Constitution, a law must not interfere unreasonably with a plaintiff's right to practice his religion. (Pet. App. 10a, 13a). Here, in balancing the religious infringement against the State's interest in women's health and gender equity, the court emphasized that "the WHWA does not literally compel [petitioners] to purchase contraceptive coverage," since the contraception coverage provision applies only if petitioners voluntarily choose to offer prescription drug benefits to their employees. (Pet. App. 13a). While petitioners may have a religious obligation to provide just wages and benefits to their employees, the court pointed out that "[i]t is surely not impossible, though it may

be expensive or difficult to compensate employees adequately without including prescription drugs in their group health care policies." (Pet. App. 13a).

Finally, petitioners' Establishment Clause challenge to the religious employer exemption failed because, unlike in *Larson v. Valente*, 456 U.S. 228 (1982), the exemption here did not, nor was it designed to, favor one religious denomination over another. The WHWA was held to be generally applicable and neutral between religions. (Pet. App. 14a).

REASONS FOR DENYING THE PETITION

Petitioners urge this Court to grant a writ of certiorari to "clarify" its holding in *Smith*, 494 U.S. 872, and *FAIR*, 126 S.Ct. 1297, but there is nothing to clarify. The state court's straight-forward application of *Smith* to dismiss petitioners' free exercise challenge to the neutral and generally applicable insurance law breaks no new ground. The free speech doctrines petitioners invoke have no application here because the insurance law regulates conduct, not expression. The standard applied in *Smith* was subsequently reaffirmed by this Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993), and the decision below does not present a split among the courts of appeals or a conflict with the decisions of other state courts. Indeed, the one other state court to have considered a free exercise challenge to a similar law also rejected it, on the same grounds as the court below. *See Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527 (Cal. 2004), *cert. denied*, 543 U.S. 816 (2004). Accordingly, further review is unwarranted.

In *Smith*, this Court unambiguously held that the Free Exercise Clause permits evenhanded enforcement of general,

neutral laws, even if the laws have the incidental effect of burdening particular religious practices. 494 U.S. at 883-84, 890. The court below correctly determined that the WHWA is such a general and neutral law. (Pet. App. 6a-7a). The WHWA applies to petitioners not as result of their "religious beliefs" or "religious motivation," *Church of the Lukumi Babalu Aye*, 508 U.S. at 533-34, but because petitioners employ workers and offer group health insurance benefits like other non-exempt organizations. (Pet. App. 4a, 6a, 13a).

Petitioners do not challenge the neutrality or general applicability of the WHWA for purposes of seeking a writ of certiorari.[5] Rather, they ask this Court to set aside its now

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5. Petitioners in a footnote question the neutral and general character of the WHWA because the contraception coverage mandate applies only to prescription drug plans and not to all group health insurance plans, and because it contains an exemption for religious employers. (Pet. 24 n.16). Petitioners are mistaken. The contraceptive coverage provision applies generally to every group prescription drug plan in the State unless the employer can claim the "religious employer" exemption, and the exemption is neutral because it does not target or distinguish among religions.

The Court has on more than one occasion upheld religious exemptions -- like the one employed in the WHWA – that do not distinguish among religions and serve the secular purpose of lessening the burden on religious practice. It has found such religious accommodations to satisfy both Establishment Clause and equal protection scrutiny, which implies the neutrality of such laws. *See, e.g., Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335-36, 338-39 (1987) (upholding Title VII's exemption for religious organizations; the provision is neutral on its face and has a secular purpose to accommodate religion); *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 18 (1988) (upholding an exemption to a state nondiscrimination law for religious corporations); *Walz v. Tax Comm'n*, 397 U.S. 664, 679, 672-73 (1970) (upholding a state

(Cont'd)

well-settled holding in *Smith* and apply a higher standard of constitutional review to their free exercise claim than *Smith* affords. In support of their claim, they invoke a laundry list of First Amendment doctrines which have no proper application to this case.

1. Petitioners first urge this Court to resolve a purported split in the Circuits as to whether to recognize a unique "hybrid" First Amendment claim stemming from an infringement on both religious practice and speech. Petitioners argue that language in *Smith* laid the foundation for such a hybrid claim, meriting strict scrutiny, rather than the more limited review prescribed by *Smith* for neutral, general laws that burden religion. (Pet. 19-20). Petitioners claim that this case presents an appropriate vehicle for considering such a claim, because the New York insurance law at issue here allegedly infringes not only their free exercise rights, but their free speech and association rights as well.

But there is no cause for this Court to review petitioners' "hybrid" claim in this case, for several reasons. First, there is no genuine Circuit split on the issue; while some courts of appeals have suggested that they would recognize such a hybrid rights claim in a proper case, not a single circuit court decision cited in the Petition (Pet. 19-20 & n.12), has actually done so. Nor does any decision of this Court following *Smith* even remotely suggest that such a hybrid claim exists. *Cf. Church of the Lukumi Babaly Aye*, 508 U.S. at 566-67 (Souter, J., concurring) (rejecting hybrid-rights hypothesis as "untenable").

(Cont'd)

property-tax exemption for religious organizations operating property for exclusively religious purposes). To the extent petitioners complain that the religious exemption in the WHWA is too narrow, this Court has directed such complaints to the political process. *See, e.g., Smith*, 494 U.S. at 890.

Smith referred to the so-called "hybrid rights" cases merely to emphasize that the free exercise standard applied in *Smith* was not novel, but had been consistently applied by the Court in the past. In repudiating the strict scrutiny test of *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court in *Smith* distinguished several of its prior decisions that seemed to apply that standard to free exercise claims. The Court explained that

> [t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.

Smith, 494 U.S. at 881. That language does not purport to create a special category of hybrid claims, but rather notes that in the case of a neutral generally-applicable law burdening religion, it is only a free speech claim and not a free exercise claim that will trigger strict scrutiny. The facts of *Smith*, the Court observed, did "not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right." *Id.* at 882.

2. Nor does this case involve communicative activity. Thus, even if there were uncertainty as to the meaning of the hybrid-rights language in *Smith*, this case would still be an ill-suited vehicle for its resolution since petitioners have not presented a colorable companion free speech claim. Even those Circuits that purport to recognize a doctrine of hybrid rights have categorically rejected constitutional challenges in the circumstances of this case, when a plaintiff merely combines "a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right."

Miller v. Reed, 176 F.3d 1202, 1208 (9th Cir. 1999); *see also Civil Liberties for Urban Believers, Christ Ctr. v. City of Chicago*, 342 F.3d 752, 765 (7th Cir. 2003); *Swanson By and Through Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998).

Petitioners agree that compliance with a law regulating healthcare benefits is not speech. (Pet. 16). The WHWA affects what a health insurance plan must cover, or what an employer must do, and not what an employer or anyone else must say. Nor does the WHWA regulate expressive or symbolic conduct. Only conduct that is "inherently expressive" is extended protection under the First Amendment's Free Speech Clause. *See FAIR*, 126 S.Ct. at 1310 (citing *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). Providing a health insurance policy is not inherently expressive, because petitioners' views about any of the multitude of prescription drugs and treatments covered by the policy cannot be known absent explanatory speech. *See FAIR*, 126 S.Ct. at 1310-11. Nor can the employee's use of prescription contraceptives be considered communicative activity, particularly since the Court has recognized the intrinsically private nature of that act. *See Griswold v. Connecticut*, 381 U.S. 479 (1965). Indeed, because contraceptive drugs can be prescribed for medical purposes other than contraception, it is impossible to draw any conclusion about an employer's views of contraception from the fact that its health plan covers these drugs.

Petitioners ignore these fundamental distinctions between expressive activity and conduct and attempt to "stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect." *FAIR*, 126 S.Ct. at 1313. Petitioners invoke three speech doctrines: compelled speech, compelled subsidization, and compelled association. For each, they make essentially the same claim – that the

WHWA compels them to endorse contraception contrary to the tenets of their faiths.

It does not. Petitioners assert that by providing insurance coverage for contraceptive drugs, they are communicating a message of endorsement or approval, but that claim is simply false. An employer who provides employees with health coverage for prescription drugs is not thereby expressing approval of every medication or treatment used by the employees; this would be so even in the absence of legal compulsion, and it is especially clear when the coverage is provided under compulsion.

This Court corrected the mistake petitioners make here as early as *O'Brien*, when it rejected the view that "conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." 391 U.S. at 376. Its decision in *FAIR* last year reiterates this distinction between conduct and expression and summarizes each of the speech doctrines on which petitioners rely. That comprehensive decision squarely forecloses all of petitioners' speech arguments. Because there is no communicative activity here, the hybrid-rights theory is irrelevant, and this case is indisputably governed by a straight-forward application of *Smith*.

a. Petitioners argue that the WHWA compels them to endorse their employees' contraceptive use, contrary to their own religious views, calling this compelled speech. They rely on *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995) (Pet. 14, 18), which barred application of a state nondiscrimination law to require parade organizers to include a group of gay marchers who would impart a message the organizers did not wish to convey. Petitioners imply that providing health insurance that pays for a drug they oppose is analogous to holding a parade that

contains a contingent of marchers they reject, but there is no comparison.

A parade, *Hurley* held, is more than just persons marching from one point to the next. *Hurley*, 515 U.S. at 568. It is a group of marchers making a collective point, both to each other and to the bystanders along the way. *Id.* As such, a parade can be a form of protected expression, not unlike a protest march. *Id.* This Court was careful to point out that it was not the sexual orientation of the individual marchers in the parade that would have been compelled speech, but the message the gay parade-contingent intended to express in the parade. *Id.* at 570, 572. But as discussed above, the provision of health insurance is not an expressive activity like a parade. Thus, *Hurley*'s compelled-speech doctrine has no application here.

Moreover, even if compliance with the WHWA did convey a message without the need for explanatory speech, which it does not, there is little chance that the message would be identified with petitioners. Petitioners' compelled endorsement claim is similar in all relevant respects to the endorsement claim rejected by this Court in *FAIR*, and therefore presents no claim warranting this Court's review. *See* 126 S.Ct. at 1302-03.

In *FAIR*, an association of law schools challenged a federal law, known as the Solomon Amendment, 10 U.S.C. § 983 (Supp. 2005), that denied federal funding to schools unless they offered equal access to military and nonmilitary recruiters. The association argued that forcing its member schools to allow military recruiters on campus violated their freedom of speech by, among other things, compelling the law schools to endorse the military's position on homosexuality, with which it disagreed. *FAIR*, 126 S.Ct. at 1302-03.

This Court rejected that argument. *Id.* at 1310. It found little likelihood that the views of the recruiters would be associated with the law schools who hosted them on campus. As the Court explained, "[n]othing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies." *Id.* The court relied on its earlier decision in *Prune Yard Shopping Center v. Robins*, which upheld a state law requiring a shopping center owner to allow certain expressive activities by others on its property because "there was little likelihood that the views of those engaging in the expressive activities would be identified with the owner, who remained free to disassociate himself from those views and who was 'not . . . being compelled to affirm [a] belief in any governmentally prescribed position or view.'" *FAIR*, 126 S.Ct. at 1310 (quoting *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980)).

The claim of compelled endorsement here fails for the same reason that defeated the claim in *FAIR*. Like the law school compelled to provide space for military recruiters, the employer compelled to provide health insurance coverage for contraceptives is not thereby compelled to endorse any message. As with providing space for military recruitment, nothing about the provision of employee health insurance suggests that petitioners endorse the particular choices made by their employees in using their benefits, or the private reproductive choices made by their employees.[6]

6. If petitioners' theory of endorsement were correct, then every employer who objected to medication or treatment obtained by its employees, and paid for even in part by employer-provided health insurance, could raise a free speech "endorsement" claim cognizable under the First Amendment. Such objections could include matters as routine as vaccinations, as critical as blood transfusions, or as controversial as stem-cell treatments. The claim could potentially be made even for objections that have no basis in religion. The potential for litigation over the details of health insurance coverage would be limitless.

Petitioners remain free to express their views about contraception, and can disassociate themselves from both the government's mandate and their employees' conduct. Just as "high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so," *FAIR*, 126 S.Ct. at 1310, petitioners' employees and the public at large can distinguish between conduct that petitioners endorse and insurance coverage which petitioners are legally required to provide.

b. Petitioners attempt to distinguish *FAIR* on the ground that they are required to subsidize the condemned conduct rather than merely host it, but that distinction can have no legal significance here. As a preliminary matter, there is no basis for distinguishing the economic value of the space provided in *FAIR* from the economic value of the additional insurance coverage at issue here; indeed, the record in this case does not establish what, if any, additional cost to the employer results from including contraceptives in the list of drugs covered by a prescription drug benefit.

Even assuming petitioners subsidize to a constitutionally significant degree the use of medications they oppose, the compelled-subsidy doctrine – like the compelled-speech doctrine – is limited to compelled support for the *expressive* activities of private persons or entities. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005)(explaining that "compelled-subsidy" cases involve situations "in which an individual is required by the government to subsidize a message he disagrees with"); *Keller v. State Bar*, 496 U.S. 1, 14 (1990) (prohibiting compelled financing of political and ideological activity); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977) (same). As discussed above, an employer's

act of providing a health insurance plan to its employees is not an expressive activity. As a result, the compelled-subsidy doctrine, which petitioners attempt to invoke, has no application.

c. Nor does petitioners' claim find support in this Court's cases protecting the right of expressive association. Petitioners attempt to rely on *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (Pet. 17), but that case also has no application here. *Boy Scouts* held that New Jersey could not require a Boy Scout troop to retain a gay scoutmaster without violating the Boy Scouts' First Amendment right of expressive association. *See id.* at 656. Because Dale was open about his sexuality, a leader in his community, and a gay activist, this Court held that "Dale's presence in the Boy Scouts would . . . force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653.

But unlike the public-accommodations law at issue in *Boy Scouts*, the WHWA does not affect petitioners' right to associate for the purpose of speaking, or affect expression in any way. Neither health insurance nor particular prescription drugs contain an inherent message that can interfere with petitioners' expression. The law does not compel or prevent petitioners from associating with anyone, nor do petitioners claim that it does. *Cf. FAIR*, 126 S.Ct. at 1312. Indeed, they have chosen to associate with employees who do not share their faiths and who wish to purchase prescribed contraceptives, despite petitioners' moral disapproval of the practice. The law at issue here neither prevents nor compels that association.

As in *FAIR*, the challenged law leaves petitioners and their associates free to express their disapproval of the condemned conduct. *Cf. FAIR*, 126 S.Ct. at 1312-13. While some deference is due to an association's view of what will interfere with its expression, *see Boy Scouts*, 530 U.S. at 653, petitioners "cannot 'erect a shield'" against application of the WHWA simply by asserting that the statute will "'impair [their] message.'" *FAIR*, 126 S.Ct. at 1312 (quoting *Boy Scouts*, 530 U.S. at 653).

d. Petitioners argue that this Court's review is needed in this case because the WHWA is a unique and unprecedented law. But there is nothing unique or unprecedented about mandated-benefits statutes, which require insurers to provide specific insurance benefits for particular types of insurance contracts. *See, e.g. Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 727-28 (1985) (upholding Massachusetts statute requiring provision of mental health benefits in employee healthcare plans against ERISA preemption challenge).

Rather than seeking a clarification of *Smith*, petitioners seek its wholesale reversal. Their hybrid rights theory stands ready to swallow the free exercise standard of *Smith*, and convert any claimed burden on religious practice – even if based on compliance with a generally applicable law – into a free speech claim subject to strict scrutiny. This was precisely the standard *Smith* rejected. This case presents no reason to revisit *Smith*.

3. In another attempt to carve out an exception to *Smith*, petitioners argue that certiorari is warranted to resolve whether *Smith* applies to *institutions* just as it applies to *individuals*. (Pet. 20-23). This Court has already decided that question, and there is no reason to reconsider it now. The Court has routinely analyzed the application of general

principles of employment law to religious institutions without reference to the doctrine of church autonomy invoked by petitioners. *See Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 306 (1985) (upholding enforcement of Fair Labor Standards Act requirements on a religious foundation without reference to the church autonomy doctrine); *United States v. Lee*, 455 U.S. 252, 259-61 (1982)(considering religious employer's obligation to pay social security taxes for his employees without reference to church autonomy doctrine).

The doctrine petitioners invoke holds that the First Amendment bars courts from adjudicating intrachurch disputes that require judicial determinations on matters of religious doctrine or internal church governance. *See, e.g., Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Jones v. Wolf*, 443 U.S. 595 (1979). But these cases have no application beyond the context of intraorganization disputes. They do not extend to any matter that involves a church entity or which affects a religious organization's labor practices, as petitioners would have it. *See General Council on Fin. & Admin. of the United Methodist Church v. Cal. Superior Court*, 439 U.S. 1369, 1372 (1978) (Rehnquist, J.) (order denying stay). The perceived danger in the church autonomy cases is that "the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs." *Id.* at 1373. Outside the context of internal church disputes, that danger is not present and therefore the doctrine is not applicable. *Id.*

The church autonomy cases cited by petitioners (Pet. 21 & n.13) have no relevance here, as they each involve injecting the State into the churches' decisions about how to resolve matters of religious doctrine. The WHWA does not regulate petitioners' hiring decisions at all; it merely regulates an

employment benefit, much like a minimum wage or social security tax.[7] While petitioners claim they have the right to limit their employees to persons who share their faith and pledge conformity to church teachings (Pet. 22), they have not chosen to do so, and indeed, such a limitation would be one step in qualifying for the religious exemption in the law they challenge.

4. Finally, petitioners argue that certiorari is warranted to correct the state court's alleged error in failing to consider whether the challenged religious infringement was necessary to advance the State's objective, even though the law is neutral and generally applicable. (Pet. 24 & n.17). Petitioners term this supposed error a failure to apply "rational basis review." (Pet. 23-24). They claim that *Smith* should be clarified to hold that even a neutral, generally applicable law that burdens religion must be "rationally designed to promote its legitimate objective." (Pet. 27; *see also* Pet. 23, 24-25). The court below applied *Smith* to the letter, however, and no reconsideration of *Smith* is warranted.

In *Church of the Lukumi Babalu Aye*, 508 U.S. at 531-32, this Court saw no cause to revisit *Smith*'s now well-settled standard, nor have petitioners presented any reason to do so now. The three federal circuit cases they identify as in conflict with this case (*see* Pet. 24 n.17) applied *Smith* correctly, examining only whether the challenged law was neutral and generally applicable. *See Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649-50 (10th Cir. 2006); *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024,

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7. For the same reason, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), cited by petitioners (Pet. 22), has no relevance to this case. The WHWA does not compel petitioners to negotiate with an employee union.

1032 (9th Cir. 2004); *Fifth Ave. Presbyterian Church v. City of N.Y.*, 293 F.3d 570, 576 (2d Cir. 2002).

The only conflicting decision identified by petitioners is a decision of the Utah Supreme Court, which mistakenly added an additional layer of review, requiring a determination that the challenged statute was rationally related to a legitimate state end. *See State v. Green*, 2007 UT 76, P32-P33 (Utah 2004). That case, however, flatly contradicts the clear holding of *Smith* that if "prohibiting the exercise of religion . . . is not the object of the [challenged law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment [Free Exercise Clause] has not been offended." *Smith*, 494 U.S. at 878. This single decision from Utah does not warrant this Court's review or require additional clarification of *Smith*.

Indeed, the "minimal level of constitutional scrutiny" petitioners seek (Pet. 25) is satisfied where the law applies generally and does not target religion, as required by *Smith*. Petitioners seek to add to *Smith* a requirement of rational basis review with "teeth." (Pet. 25 n.18). But that standard adds nothing to *Smith* and would not change the result here. In both *Romer v. Evans*, 517 U.S. 620, 634 (1996), and *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 450 (1985), cited by petitioners as exemplars of the standard they advocate, this Court invalidated statutes because they were motivated by "animosity" or "irrational prejudice" toward the class of persons affected. But a law motivated by animosity or irrational prejudice toward religion would fare no better under *Smith*. A law targeting religion would lack neutrality and thus would be subject to strict scrutiny, and if motivated by animus or irrational prejudice, it would likely fail that scrutiny.

In any event, there is no cause to revisit the holding of *Smith* in the context of this case, because the court below

applied the standard petitioners now seek when it rejected their parallel state free exercise claim. The state standard requires a showing that the challenged legislation "is an unreasonable interference with religious freedom," balancing the infringement on religious practice against the State's legitimate interest. (Pet. App. 10a). In applying that standard, the court weighed the "substantial" burden the WHWA places on petitioners' religious practices against the State's "substantial" interest in gender equality and women's health. (Pet. App. 13a-14a). The court correctly concluded that while the Legislature might have made another choice in balancing those two interests, it could not say that its choice was an unreasonable interference with petitioners' exercise of their religion. (Pet. App. 14a).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CATHOLIC CHARITIES OF
THE DIOCESE OF ALBANY, *et al.*,

Petitioners,

v.

ERIC R. DINALLO, SUPERINTENDENT,
NEW YORK STATE INSURANCE DEPARTMENT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

SUPPLEMENTAL BRIEF FOR RESPONDENT

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I

This supplemental brief is submitted pursuant to Supreme Court Rule 15(8) in response to a brief filed by a group of amici curiae in support of the petition for a writ of certiorari. Amici's brief was filed on the same day that respondent filed its opposition and presents a claim not addressed in the petition.

Amici argue that this Court should grant a writ of certiorari to consider whether the religious employer exemption in the Women's Health and Wellness Act ("WHWA")[1] contains "'denominational preferences.'" Amici Br. 15 (citing *Larson v. Valente*, 456 U.S. 228, 246 (1982)). Amici do not identify whether they seek review of the state court's Free Exercise Clause holding (Pet App. 5a-9a) or its Establishment Clause holding (Pet. App. 14a-15a), but in either case, a denominational preference argument was not presented in the petition and so is not before this Court.

Even if amici's attempt to seek review of a question not fairly encompassed within the petition were cognizable – which it is not – amici's religious gerrymander claim still would not merit certiorari review. Amici do not identify a circuit split, nor could they, because as they themselves assert, the governing standards are settled. *See* Amici Br. 5, 12-13. Amici seek only error correction, arguing that the New York Court of Appeals failed to properly apply this Court's precedents to the WHWA's religious employer exemption.

Moreover, even if the Court were inclined to grant a writ of certiorari for that purpose, such an error could not properly be considered in this case because petitioners conceded in the Court of Appeals that the religious employer exemption does not expressly prefer or disadvantage one church over

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1. *See* N.Y. Ins. Law §§ 3221(l)(16)(a)(1), 4303(cc)(i)(A) (Pet. App. 97a, 99a).

another, *see* NYCA Reply Br. 29.[2] It is no surprise that petitioners have failed to raise this claim in the petition, because a successful challenge to the scope of the religious employer exemption could, under New York law, result in severance of the exemption from the WHWA. *Cf. Larson*, 456 U.S. at 255 (affirming the Court of Appeals' decision to sever under state law a religious exemption that violated the Establishment Clause). This result would not benefit petitioners and would harm their affiliated churches, which can currently take advantage of the exemption.[3]

REASONS FOR DENYING CERTIORARI TO REVIEW AMICI'S NEW CLAIM

1. This Court should decline amici's invitation to review a claim different from the ones presented in the petition, based on a wholly different constitutional theory, and presenting the prospect of a drastically different remedy. An amicus brief in support of a petition for certiorari is an inappropriate vehicle to expand the petition by presenting a question that no party has raised. As this Court has consistently affirmed, it is the petitioner who "controls the scope of the question presented." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). While the question presented includes "subsidiary question[s]," *id.*, amici's denominational preference claim

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2. "NYCA Reply Br." refers to the Reply Brief filed by plaintiffs-appellants in this action in the New York Court of Appeals.

3. Amici's first argument challenging the religious employer exemption, Amici Br. 9-12, is beyond the scope not only of the petition but also of the issues litigated by the parties below. It is also mistaken. There is no conflict between the decision below and the Third Circuit cases cited by amici. Those cases hold that when a general law provides discretionary exemptions for secular reasons it must also provide exemptions for claims of religious hardship. They have no application to the WHWA, which does not provide for individual exemptions on secular grounds.

is neither encompassed within the scope of the question presented, nor is it subsidiary to it.

Petitioners expressly limited the scope of their petition to claims challenging the burden imposed on their free exercise of religion and other First Amendment rights, and did not argue that any provision in the WHWA gives a preference to certain religions or otherwise imposes a religious gerrymander. Petitioners asked this Court to consider: (1) whether the contraceptive coverage provision gives rise to the "hybrid rights" situation that might warrant strict scrutiny under *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990), because it involves infringement on religious practice together with "not insubstantial" speech and association claims (Pet. 13, 19-20); (2) whether the contraceptive coverage provision interferes with petitioners' rights of free speech and association by coercing petitioners to financially subsidize and therefore "endorse" contraceptive use (Pet. 13-19); (3) whether the contraceptive coverage provision infringes petitioners' right to institutional autonomy by regulating an aspect of their relationship with their employees (Pet. 20-23); and (4) whether the WHWA is invalid under *Smith*, even though neutral and generally applicable, because it "operates in a decidedly irrational manner" and "unnecessarily infringes petitioners' free exercise rights" (Pet. 23-27).

Petitioners discuss the religious employer exemption – which is at the heart of amici's denominational preference claim – only with respect to this final ground for granting a writ of certiorari. But unlike amici, petitioners do not argue that the scope of the exemption creates a sectarian preference or otherwise strips the law of its neutrality or generality. They argue instead that denying an exemption to *any* employer who opposes contraceptives on religious grounds renders the law irrational, and thus invalid under their reading of the *Smith* standard for neutral, general laws. In petitioners' view,

refusing to exempt any religious employer from the requirement to include coverage for prescription contraceptives in its prescription drug plan irrationally "undercuts the objective of the law" to advance women's health, in that the exemption allegedly creates an incentive for those employers to withdraw prescription drug coverage altogether. (Pet. 26).

As part of arguing the law's irrationality, the petition asserts in a footnote that the lower court's finding that the law is neutral and generally applicable is "questionable" because the contraceptive coverage requirement applies only to employers who choose to provide prescription drug coverage in the first place, and because the law contains an exemption from that requirement. (Pet. 24 n.16). But the petition pointedly does not ask this Court to review the law's neutrality or general applicability, and does not challenge the scope of the exemption. Rather, the question for which petitioners seek review presupposes the WHWA's neutrality and general applicability.

Amici make the fundamentally different argument that the exemption creates denominational preferences by exempting from the Act's contraceptive coverage provision those religious entities that amici term "inward-looking," while leaving out those it considers "outward-looking." Amici Br. 13, 15-16. While amici do not state which holding of the decision below they are challenging, or on what doctrinal basis, their brief cites primarily to the free exercise holding of the New York Court of Appeals. Amici Br. 14-15, 17. It appears, therefore, that they claim that the religious employer exemption renders the WHWA not "neutral" or "generally applicable" under the *Smith* standard. That claim is beyond the scope of the petition, no matter how broadly the petition is construed. As discussed above, the petition does not ask this Court to review the lower court's holding that the WHWA is a neutral law of general applicability.

Petitioners instead complain that the court, having made that finding, upheld the law with no further review into its rationality. (Pet. 23-27).

Amici fare even worse if their claim is characterized as resting on the Establishment Clause, although that is a closer doctrinal fit to their constitutional challenge. *See Larson*, 456 U.S. at 244-50 (analyzing denominational preference challenge to religious exemption under the Establishment Clause); *see also Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-39 (1987) (reviewing challenge to religious exemption under Establishment Clause); *Walz v. Tax Comm'n*, 397 U.S. 664, 672-80 (1970) (same); *cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (explaining that government efforts to benefit particular religions are generally reviewed under the Establishment Clause). The petition does not contain any Establishment Clause challenge, and perhaps for that reason amici have not explicitly invoked the Establishment Clause, although they rely heavily on *Larson* and other cases decided under that provision.

Amici's claim is flatly inconsistent with the strategic choice embodied in the petition not to assert a claim of denominational preference. The incompatibility of the two claims is even more stark when the potential remedies are considered. Amici's view, if accepted, could lead to severance of the exemption, to the detriment of petitioners' affiliated churches. By contrast, the petitioners' claims, if accepted, would result in invalidation of the contraceptive coverage requirement itself. That petitioners have made a strategic choice not to present amici's denominational preference claim is confirmed by the fact that petitioners did not adopt the claim even in their reply brief, which was filed after a full opportunity to consider and evaluate amici's arguments.

This Court has routinely refused to "consider questions outside those presented in the petition" even with a petitioner's

express consent. *See, e.g.*, *Yee*, 503 U.S. at 535. Here, petitioners' apparent refusal to join in amici's new claim presents an especially compelling reason for this Court not to consider the claim raised in the amicus brief. Because under any formulation, amici's new claim was not set forth in the petition or "fairly included therein," it should not be considered by this Court. Sup. Ct. R. 14.1(a).

2. Even if amici's arguments were encompassed within the petition, amici's claim still would not merit review. There is no circuit split as to the standard for identifying a religious gerrymander. As amici recognize, that standard has long been settled. Amici Br. 5, 12-13. Amici seek nothing more than routine error correction because in their view, the New York Court of Appeals made a mistake in applying this Court's clear and uncontroverted precedents to the facts of this case.

But the Court of Appeals made no error. Instead, it correctly applied this Court's precedents in concluding that the contraceptive coverage provision is neutral and generally applicable, and that the religious employer exemption does not prefer one religious denomination over another.

The Court of Appeals correctly held that the contraceptive coverage provision is a neutral law of general applicability that requires all employer health insurance policies to include in their prescription drug plans coverage for prescription contraceptives. (Pet. App. 6a). Religious beliefs were not the law's "'target,'" the court found, "and it was plainly not that law's 'object' to interfere with plaintiffs' or anyone's exercise of religion." (*Id.*). "Its object was to make broader health insurance coverage available to women and, by that means, both to improve women's health and to eliminate disparities between men and women in the cost of health care." (*Id.*).

In addition, the Court correctly held that the law's exemption for some employers who oppose contraceptives on religious grounds does not alter the contraceptive coverage provision's neutrality or generality. (Pet. App. 6a). Even taking into account

the limited exemption for religious employers, the WHWA is still "generally applicable and neutral between religions" (Pet. App. 14a), and was not designed to give official preference to one religious denomination over another (Pet. App. 14a (citing *Larson*, 456 U.S. at 244)).

Amici's attempted analogy to the religious exemption struck down as a religious gerrymander in *Larson* fails. *See* Amici Br. 14-16. *Larson* involved a state statute that imposed reporting requirements on charitable organizations that solicit funds, and exempted religious organizations that received more than half of their total contributions from members and affiliated groups. The statute was challenged as an establishment of religion by members of the Unification Church, which did not qualify for the exemption. This Court held that the statutory scheme was an unconstitutional establishment of religion because the purpose and effect of the limited religious exemption was to impose the reporting requirement on the Unification Church and similar relatively new religious denominations while exempting the Roman Catholic Church and other established religious denominations. 456 U.S. at 253-54. While one of the dissenting opinions disputed this conclusion as a factual matter, *id.* at 260-61 (White, J., dissenting), both the majority and that dissent made it plain that this factual conclusion was the lynchpin of the ruling, *id.* at 254, 263.

The flaw identified in the statute at issue in *Larson* was that, without compelling justification, it "makes explicit and deliberate distinctions between different religious organizations" – namely, between well-established churches that have strong financial support from the members, and churches that are new and for that reason or as a matter of policy rely on public solicitation more than on financial support from members. *Id.* at 247 n.23. The Court unambiguously found, based on the text of the statutory exemption and a comparison with the prior more expansive version that it replaced, that "the fifty per cent rule's capacity – indeed its express design – [was] to burden or

favor selected religious denominations." *Id.* at 255. Because the Court found that the statute deliberately targeted disfavored religious groups, it could not qualify as "a facially neutral statute, the provisions of which happen to have a 'disparate impact' upon different religious organizations." *Id.* at 247 n.23.

Larson was an Establishment Clause case, but the selective targeting of a disfavored religious group may also be the basis for finding a violation of the Free Exercise Clause. In *Church of the Lukumi Babalu Aye*, this Court invalidated on free exercise grounds a city ordinance prohibiting the ritual slaughter of animals, largely because the Court found that the ordinance targeted the religious practice of the Santeria religion, with the purpose and effect of suppressing the central element of that religion's worship service. 508 U.S. at 534-42.

Unlike the laws at issue in *Larson* and *Church of the Lukumi Babalu Aye*, the WHWA's exemption for religious employers who are opposed to contraceptives on religious grounds is not targeted at particular religious denominations. The WHWA's operation, purpose, and legislative history all point to its denominational neutrality. (Pet. App. 14a, 41a-42a). Petitioners acknowledged as much when they conceded in the New York Court of Appeals that the WHWA "does not explicitly prefer one Church over another, and its criteria do not disadvantage all branches of any Church." NYCA Reply Br. 29.

Instead, the New York statute at issue in this case more closely resembles the statute upheld in *United States v. Lee*, 455 U.S. 252 (1982). At issue in *Lee* was a federal statute that exempted from Social Security taxes individual self-employed members of a religious sect that conscientiously opposes insurance, but did not exempt employers or employees in an employment relationship. Like the WHWA, the statute in *Lee* created an exemption for religions with a conscientious objection to the statutory requirement, but imposed a limitation on the exemption. The limitation in *Lee*, like the limitation in this case,

could conceivably have the effect of imposing greater burdens on some religious sects than others, depending on the employment practices of their members, but the record does not establish that it in fact draws denominational lines, either on the face of the statute or in its practical effect. In particular, the Court noted that it exempted the self-employed Amish but not all Amish employers or employees. In rejecting the claim that this limited exemption violates the Free Exercise Clause, the Court observed:

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

455 U.S. at 261. *Lee* held that the Free Exercise Clause did not require exempting a religious employer from social security taxes, because such an exemption would "impose the employer's religious faith on the employees." *Id.* Similarly in this case New York has exempted from the WHWA certain religious employers that interact principally with members of their own religion, but not those that employ or serve substantial numbers of nonmembers. In light of *Lee*, New York was entitled to conclude that the Free Exercise Clause did not require exempting all religious employers from the WHWA because such an exemption would impose the employer's religious faith on the employees.

Nothing about the WHWA targets any particular religion, nor does the WHWA's exemption categorically include or exclude all activities of any particular religion. To the extent that the WHWA's exemption excludes some religious entities, it does not do so on sectarian grounds, but rather on the basis of denominationally neutral factors that apply evenhandedly across denominational lines. *See Cutter v. Wilkinson*, 544 U.S. 709,

724 (2005) (A law does not establish religion where it "confers no privileged status on any particular religious sect, and singles out no bona fide faith for disadvantageous treatment."). The exemption has the purpose and effect of accommodating any and all religious organizations whose employment practices and operations minimize the harms that the WHWA was enacted to counteract, as determined by broad and objective denominationally neutral categories drawn to avoid an "intrusive inquiry into religious belief," *Amos*, 483 U.S. at 339.

Thus, as with New York's religious property tax exemption upheld in *Walz*, and the Social Security exemption upheld in *Lee*, the New York Legislature in this statute struck a constitutionally valid balance among several important objectives: advancing the public health and welfare, accommodating religious practice, and avoiding excessive government entanglement with religion. This Court has long emphasized that "'there is room for'" ameliorative statutes like the WHWA that "'allow[] the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause.'" *Cutter*, 544 U.S. at 713 (quoting *Locke v. Davey*, 540 U.S. 712, 713-14, 718 (2004)); *see also Walz*, 397 U.S. at 673. The WHWA does precisely that. Accordingly, amici's claim merits no further review.

CONCLUSION

The petition for writ of certiorari should be denied.

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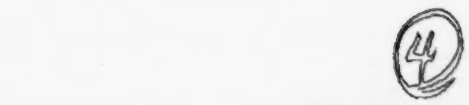

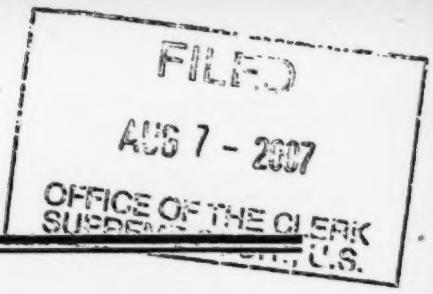

No. 06-1550

IN THE

Supreme Court of the United States

CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY, *et al.*,
Petitioners,

v.

ERIC R. DINALLO, SUPERINTENDENT, NEW YORK STATE INSURANCE DEPARTMENT,
Respondent.

On Petition for a Writ of Certiorari to the New York Court of Appeals

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Petitioners' Rule 29.6 Statement was set forth at pages ii–iv of the Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

This is an extraordinary case. There is no other context in which any court has held that the state may coerce a church entity to finance private conduct that the church teaches is morally wrong. Such coercion strikes at the heart of a church's ability effectively to transmit its values and implicates several First Amendment precedents—including decisions respecting freedom from coerced subsidization, associational freedom, and the institutional autonomy of churches.

The Brief In Opposition ("Brief") quibbles with these precedents and portrays this case as a "straightforward" application of *Employment Division v. Smith*, 494 U.S. 872 (1990). In so doing, the Brief, as it must, adopts the most

restrictive reading possible of decisions in which this Court has defended institutional and associational freedom against government encroachment, and propounds the most expansive reading possible of otherwise distinguishable holdings found in decisions that involve government speech and vital Congressional powers, such as *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 126 S. Ct. 1297 (2006) ("*FAIR*"). Then, having created a shoebox framed by its interpretation of *Smith* and *FAIR*, the Brief crams this case into the confines of its box and argues that there is nothing for this Court to clarify.

If this Court's prior decisions can be read as Respondent urges, that only underscores the need for guidance from this Court, lest its prior decisions continue to be read—or *mis*read—to undermine one of the most basic liberties protected by the Constitution. For the reasons stated below, Petitioners submit that these decisions should not be so read, and that the unique characteristics of this case, rather than providing fodder for distinguishing prior cases protecting First Amendment values, instead serve to illustrate the importance of bringing clarity to an issue of burgeoning national importance.

ARGUMENT

I. THERE IS A NEED FOR CLARIFICATION OF THIS COURT'S DECISIONS.

A. *Smith* Does Not Control This Case.

The central principle of *Smith* has little to do with this case. *Smith* stands for the proposition that when the state enacts a law prohibiting "socially harmful conduct," *Smith*, 494 U.S. at 885—for example, a law against polygamy—the state has an obvious interest in uniform application of that law. And when the state enacts a law requiring conduct deemed important to the community—such as the payment of taxes—

the state has an equally obvious interest in the uniform application of that law. *See, e.g.*, *United States v. Lee*, 455 U.S. 252 (1982). In these cases, the government's interest in uniform application of such laws—"neutral laws of general applicability"—is such that the government is not required to grant exemptions to individuals who articulate a religious objection. *Id.* at 263.

In this case, the State of New York has identified no conduct so harmful that no employer should be permitted to engage in it, and no benefit so important that all employers should be required to provide it. It has not enacted any "generally applicable" requirement of prescription drug coverage: employers are free to withhold such coverage altogether. What the State has done is to define the requirements of a prescription drug plan in such a way as to prohibit organizations like Petitioners from drawing the religiously-motivated distinctions they wish to draw. And in prohibiting such distinctions, the State has actually placed employees in jeopardy of losing the access to prescription drug coverage that they currently enjoy.

This is thus not the kind of neutral, generally applicable law that was at issue in *Smith*. Whether *Smith* applies at all to such a case is an open question that itself warrants review. What *Smith* means in this context, if applicable, is another question that warrants review, for the reasons explained below and in the Petition.

B. *FAIR* Does Not Control This Case.

FAIR cannot be read to reject a claim by a church entity that its coerced subsidization of contraception interferes with its religious message. Such a reading ignores the distinction between government and private speech and trivializes each Petitioner's rights as an expressive association—one now compelled by New York to subsidize private conduct that it undisputedly teaches is sinful.

As we noted in our Petition, this Court stated in *FAIR* that "[c]itizens may challenge compelled support of *private* speech," 126 S. Ct. at 1307 n.4 (emphasis added) (quotations omitted), and numerous decisions have struck down coerced subsidization of private speech. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977). Nothing in *FAIR* suggests that the endorsement inherent in *subsidization*, which was not at issue in *FAIR*, is beyond First Amendment scrutiny, particularly when a church is coerced to subsidize conduct that it teaches is sinful. The application of the First Amendment to such coerced subsidization is a fundamental issue worthy of this Court's attention.

Moreover, *FAIR* reaffirmed this Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), which held that even generally applicable laws governing conduct, such as anti-discrimination laws, may run afoul of the First Amendment if applied to expressive associations. *Dale* held that the state could not prohibit the Boy Scouts from discriminating against homosexuals in its hiring, because that would interfere with the Boy Scouts' message about homosexual conduct. In contrast, *FAIR* held that requiring law schools to provide equal treatment to military recruiters did not affect the law schools' associational rights, because "[r]ecruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association." 126 S. Ct. at 1312. This distinction, deemed "critical" in *FAIR*, *id.*, goes far in supporting Petitioners' claim that the Women's Health and Wellness Act (WHWA) overreaches when it mandates that churches violate their own teachings in their relationships with their own employees. At the very least, nothing in *FAIR* dictates the constitutionality of laws governing *internal* relationships between church entities and those employed to carry out the church's mission.

FAIR also reaffirmed *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), which prevented the application of another generally applicable anti-discrimination statute to organizers of a parade. A parade, the Court held, is more than just persons marching from one point to the next; it is a group marching to make a collective point. *Id.* at 568. The protection afforded to the parade-marchers' expression in *Hurley* was not relevant in *FAIR*, however, because "schools are not speaking when they host interviews and recruiting receptions. Unlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive." *FAIR*, 126 S.Ct. at 1309-10.

The State argues that like law schools' hosting of recruiters, the provision of health benefits by churches is not inherently expressive conduct, and thus that *FAIR* precludes redress. This analysis misses a key point of *Hurley*: one cannot determine if an act is inherently expressive by focusing on conduct (such as walking from one point to another) in isolation from the association performing the conduct (a parade). Just as a parade is more than a group of people marching from one point to the next, a church is more than an employer. And just as a parade is a group of people making a collective point, a church is a group of people embodying a collective vision of right and wrong. Thus, when a church teaches that contraception violates the commands of God, its decision to withhold coverage for contraception both reflects and promotes the church's message and collective values.

In sum, nothing in *FAIR* remotely suggests that the State may insert itself into the internal affairs of a church entity and compel it to subsidize employee conduct that it condemns. If *FAIR* can be read, as the Court of Appeals read it, to permit such coerced subsidization, then *FAIR* requires clarification.

C. The Church-Autonomy Cases Support Petitioners.

Respondent states blithely that this Court has routinely applied principles of employment law to religious institutions without reference to the doctrine of church autonomy. Yet in support, Respondent cites only *one* case involving a religious employer-employee relationship, *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 306 (1985)—a case that did not even reach the constitutional question of church autonomy, because the Court found that the challenged law placed no actual burden on the petitioners' religious practices. The only other case cited by Respondent for this point, *United States v. Lee*, 455 U.S. 252, 259-61 (1982), dealt not with an employer's relationship with its employees, but rather with an employer's relationship with the *government* and the *tax system*.

In light of this absence of support, it is worth noting that *Smith* explicitly reaffirmed the continuing validity of decisions protecting a church's right to institutional autonomy—*Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); and *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). *See Smith*, 494 U.S. at 877. Those decisions recognize that the protections of the First Amendment extend not only to matters of faith, as the State recognizes in its opposition, but also to "church administration," *Serbian Eastern Orthodox Diocese*, 426 U.S. at 710, "internal organization," *id.* at 713, and "the operation of . . . churches," *Kedroff*, 344 U.S. at 107. Implicit in these decisions is the principle that churches retain a sphere of decisional integrity, not unlike the expressive integrity shared by the secular associations discussed in *Hurley* and *Dale*, that is necessary to allow the church to craft its own message and exhibit its own values to the world. This principle is supported by decisions in lower courts, which

have held uniformly that the First Amendment protects the right of a church to make decisions about the employment of those who implement the church's religious mission.[1]

It is possible, perhaps, factually to distinguish this Court's church-autonomy cases on the basis that they did not involve decisions related to employment benefits. But it is not possible to distinguish on that ground the numerous lower court cases recognizing a ministerial exception to employment laws. Nor would that factual distinction explain this Court's concern over the "difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses" presented by governmental oversight of church employment. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501-04, 507 (1979) (raising concerns as to the NLRB's exercise of jurisdiction over lay faculty members at Catholic high schools, but resolving the case by construing a statute so as to avoid constitutional questions).

The church-autonomy cases explicitly affirmed by *Smith* suggest that a church entity has a First Amendment right to structure its relationship with its employees in conformity with church teachings—a right that, subject to strict scrutiny, trumps even neutral, generally applicable employment laws. At the very least, this is a matter worthy of clarification and guidance by the Court.

D. At a Minimum, Rational Basis Review Is Required.

Respondent incorrectly asserts that the test employed by the New York Court of Appeals under state law conforms to this Court's requirement that laws affecting liberty interests be rationally related to legitimate government interests. The Court of Appeals weighed the infringement of Petitioners' religious freedom against the interests asserted by the State in

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[1] See cases cited in the Petition at 21 n.13.

the abstract, in order to determine whether the WHWA was an unreasonable infringement. But balancing interests in the abstract does not answer the question whether the statute at issue actually advances the interests asserted by the State, or whether it fails to do so due to an irrational design. Whether such an inquiry is necessary for neutral laws of general applicability is another issue in need of clarification by this Court.

II. THE CASE PRESENTS AN ISSUE OF NATIONAL IMPORTANCE.

At bottom, this case presents the Court with an opportunity to clarify the meaning and scope of several different lines of cases in the context of a confrontation that is important to religious organizations across the country. This case is unlike any other case the Court has addressed—it involves compelled *subsidization* by *church* entities of *private* conduct that violates the *church's teachings*. The justification for this interference with religious freedom is *not* a vital public need neutrally and uniformly enforced—for no one is compelled to provide prescription drug coverage at all and, as demonstrated in the Petition, the effect of the law may well be to undermine the goal of increasing access to prescription coverage. Rather, the ultimate justification for this statute is an *ideological* one—that inclusion of contraceptive coverage in any prescription drug plan is a matter of gender equity.

Thus, in the final analysis, this case is less a conflict between religious freedom and the public welfare than it is, in the words of one jurist, "a clash of ideas"—the State's view of gender equity versus the church's view of moral truth. *Catholic Charities of Sacramento, Inc., v. Super. Court*, 85 P.3d 67, 104 n.4 (Cal.) (J. Brown, dissenting), *cert. denied*, 543 U.S. 816 (2004). Significantly, it is a clash that takes place not in the community at large, but within a church institution—in the context of a church's relationship with

those who have voluntarily joined in a religious mission of the church. In such a clash, the First Amendment dictates that the State recede, for that is the only way in which both the State and the Church can continue to promote their messages.[2]

In this case, the clash between the State and the Church involves contraception. But if the State can compel church entities to subsidize contraceptives in violation of their religious beliefs, it can compel them to subsidize abortions as well. And if it can compel church entities to subsidize abortions, it can require hospitals owned by churches to provide them.

It was not that long ago that contraceptives and abortions were illegal in many parts of this country. This Court, of course, has held that even if a majority of the population opposes those practices, it may not impose its view on those who disagree—because to do so violates rights that are *implicit* in the Constitution. It would be the height of irony if the law were to shift so far as to allow a majority of the population to impose its view of the desirability of such practices on church entities that disagree—overriding rights that are *explicit* in the Constitution. This case presents an opportunity for the Court to clarify whether its prior decisions require that result.

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[2] Professor Laurence Tribe made the same point in commenting upon the Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), noting that the case involved "a direct clash of competing images of 'the good life,'" and observing that "in such a clash, the teaching of the First Amendment has long been that the state loses." Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 Pepp. L. Rev. 641, 651–52 (2001).

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, the Petition for a Writ of Certiorari should be granted.

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Respondent.

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BRIEF FOR ADVENTIST HEALTH, THE ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, THE BECKET FUND FOR RELIGIOUS LIBERTY, THE CHRISTIAN LEGAL SOCIETY, THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, LOMA LINDA UNIVERSITY, LOMA LINDA UNIVERSITY MEDICAL CENTER, THE NATIONAL ASSOCIATION OF EVANGELICALS AND THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the State may compel a church or church entity, contrary to its religious teachings, to include contraceptives in the prescription drug program that it provides to its employees, and thereby finance conduct that the church teaches is sinful.

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ERIC R. DINALLO, SUPERINTENDENT, NEW YORK STATE INSURANCE DEPARTMENT,

Respondent.

On Petition for a Writ of Certiorari to the New York Court of Appeals

This brief of *amici curiae*[1] is submitted in support of petitioners Catholic Charities of the Diocese of Albany, *et al.* By letters filed with the Clerk of the Court, petitioners and respondent have consented to the filing of this brief.

INTERESTS OF *AMICI CURIAE*

Adventist Health is a California non-profit corporation organized exclusively for religious purposes. It owns and operates 18 hospitals and medical centers, all of which are operated in a manner that is consistent with the philosophy, teachings, and practices of the Seventh-day Adventist Church. Adventist Health employs approximately 19,000 employees.

[1] Pursuant to Rule 37.6, *amici curiae* state that no party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

The Association of Christian Schools International ("ASCI") is a nonprofit, non-denominational, religious association providing support services to more than 3,950 Christian preschools, elementary, and secondary schools in the United States. One hundred forty-five post-secondary institutions are also members of ACSI, and ACSI serves more than 1,400 schools outside the United States.

The Becket Fund for Religious Liberty ("Becket Fund") is a non-partisan, interfaith, public interest law firm dedicated to protecting the free expression of all religious traditions, and the equal participation of religious people and groups in public life and benefits. The Becket Fund litigates in support of these principles in state and federal courts throughout the United States, both as primary counsel and as *amicus curiae*. Virtually all of those cases involve claims against the government under the federal Free Exercise Clause, and in those cases the Becket Fund argues in favor of vigorous interpretation of the Free Exercise Clause to safeguard and maximize the free expression of all religious traditions.

The Christian Legal Society, founded in 1961, is a nonprofit interdenominational association of over three thousand Christian lawyers, law students, judges, and law professors. CLS's members hail from almost every state and participate in the broad and rich variety of Christian congregational life, including the Roman Catholic, Orthodox, Lutheran, Anglican, Episcopalian, Baptist, Presbyterian, Methodist, Reformed, Evangelical, Pentecostal and Charismatic traditions. Since 1975, CLS's legal advocacy division, the Center for Law and Religious Freedom ("CLRF"), has worked for the protection of religious belief and practice, including the autonomy of religion and religious organizations from the government, in the United States Supreme Court and in state and federal courts throughout the nation. CLS has filed briefs of *amicus curiae* in virtually every case in the United States Supreme Court affecting religious freedom since 1980 and, through CLRF, has

represented numerous religious organizations and individuals whose religious liberty is threatened. Believing that our universal and fundamental right to religious freedom is the inalienable gift of God, not man, CLS strives to defend religious freedom in order that men and women might remain free to do God's will.

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist church and represents nearly 54,000 congregations with more than 15 million members worldwide. In the United States, the North American Division of the General Conference overseas the work of more than 4,600 congregations with more than 918,000 members. In addition to churches and related administrative offices, the denomination runs approximately 850 elementary schools, 114 secondary schools, 14 institutions of higher learning and 35 hospitals in the United States. The church employs over 78,000 individuals in the United States. The Seventh-day Adventist church has a strong interest in insuring that religious institutions are not compelled to extend benefits that violate the tenets that define the very basis for their existence.

Loma Linda University is a California non-profit religious corporation and is part of the Seventh-day Adventist Church. The University, which is located in Loma Linda, California, is an institution of higher education that offers both undergraduate and post-graduate degrees.

Loma Linda University Medical Center ("LLUMC") is part of the Seventh-day Adventist Church and a California non-profit religious corporation. LLUMC is a teaching hospital and tertiary care center located in Loma Linda, California. It employs approximately 5,200 employees.

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and ministries in the United States. It serves 60 member denominations and associations, representing 45,000

local churches and over 30 million Christians. NAE serves as the collective voice of evangelical churches and ministries. NAE believes that religious freedom is a gift of God and vital to the limited government which is our American constitutional republic.

The Union of Orthodox Jewish Congregations of America ("UOJCA") is the largest Orthodox Jewish umbrella organization in the United States. The UOJCA represents nearly 1,000 synagogues throughout the United States, which collectively represent hundreds of thousands of individual Jews. The UOJCA, its affiliated congregations and their members also support many social service organizations, small and large, dedicated to addressing and relieving people in need of aid and assistance. Additionally, the UOJCA participates in various federal and state litigations, largely through the submission of *amicus* briefs, that relate to matters of concern to the Orthodox Jewish community.

Amici are a broad-based coalition of religious institutions that believe this case raises important questions about the religious liberty of all religious entities under First Amendment. *Amici* submit that this case is of particular significance because it illustrates one of the principal dangers inherent in legislative line-drawing based on expressly religious terms and the need for that line-drawing to be justified under the most rigorous strict scrutiny under the First Amendment.

Although *Amici* do not all subscribe to petitioners' religious tenets relating to prescription contraception, they are united in their concern over the legal principles set forth in the ruling below. The New York Court of Appeals concluded that the First Amendment, as interpreted by this Court in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), provides no protection to disfavored religious groups from legislation that requires them, but not other religious groups, to violate their sincerely held religious beliefs. Such a law is neither

"neutral" nor "generally applicable" within the meaning of this Court's decision in *Smith*.

As set forth below, review should be granted for two reasons. First, the decision below conflicts directly with decisions of the Third Circuit holding that a State law that adopts individualized or categorical exemptions from a statute that burdens religious exercise is not "neutral" or "generally applicable," and therefore must be assessed under strict scrutiny. *Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359, 364 (3d Cir. 1999) (Alito, J.); *Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.).[2]

Second, the decision below conflicts directly with this Court's decisions holding that laws that discriminate *among* religious groups – thereby allowing the State to pick and choose which claims of religious conscience are worthy of favored treatment – must satisfy strict scrutiny. *E.g.*, *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 339 (1987); *Larson* v. *Valente*, 456 U.S. 228, 246 (1982); *see also Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993). In rejecting the settled standards set forth in these cases, the Court of Appeals adopted a dangerous precedent that approves religious gerrymanders and, if left uncorrected, threatens the First Amendment rights of all religious groups.

STATEMENT OF CASE

Amici adopt the Statement of the Case set forth in the Petition for Certiorari. *Amici*, however, briefly highlight a number of aspects of the record relevant to their submission.

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[2] In all events, the State may not trample on the free exercise rights of *all* religious groups when (i) it fails to apply a law to *all* secular groups (including, for example, the governmental entity enacting the law or subordinate governmental entities), or (ii) as here, the legislation implicates hybrid-rights within the meaning of this Court's decision in *Smith*. *See* Pet. at 13-20.

New York's Women's Health and Wellness Act ("WHWA") requires that all group insurance policies that include coverage for prescription drugs also provide coverage for prescribed contraceptive drugs or devices. Pet. App. 97a, 99a. The New York Legislature included an exemption from this requirement for "religious employers" for whom compliance would require them to violate their religious tenets. The term "religious employer" is defined as those entities that can satisfy all of the following criteria:

> (a) The inculcation of religious values is the purpose of the entity.
>
> (b) The entity primarily employs persons who share the religious tenets of the entity.
>
> (c) The entity serves primarily persons who share the religious tenets of the entity.
>
> (d) The entity is a nonprofit organization as described in Section 6033(a)(2)(A)i or iii, of the Internal Revenue Code of 1986, as amended.

Under the WHWA, when a religious employer qualifies for this exemption, its employees remain eligible for such coverage through a state-mandated rider that they can purchase from their employer's insurance carrier at a cost estimated to be "on the order of $1.00 or $2.00 per month." Pet. App. 52a n.16, 71a.[3]

Petitioners are all nonprofit religious organizations, churches and religious orders that qualify as "religious employers" in other statutory contexts including employment

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[3] The New York Legislature initially proposed a broader religious exemption that would have been available to "any 'group or entity . . . supervised or controlled by or in connection with a religious organization or denominational group or entity.'" Pet. App. 3a (omission in original). The Legislature, however, ultimately adopted a more narrow exemption through which the WHWA's prescription contraception mandate would have a wider reach. *Id.*

and housing discrimination. Pet. App. 53a; see N.Y. Exec. Law § 296.11. All qualify as charitable organizations exempt from federal taxation. They do not qualify as "religious employers" within the meaning of WHWA, however, because their activities are not limited to "ministering to the faithful" and because they employ and "serve people not of their faiths." Pet. App. 4a. As part of their religious mission, they operate, for example, "a K-12 school" that provides "youth services," as well as a "prison ministry," "homeless services," "immigrant resettlement programs, affordable housing programs, job development services, and domestic violence shelters." *Id.*[4]

As the Court of Appeals acknowledged, petitioners "believe contraception to be sinful, and assert that the challenged provisions of the WHWA compel them to violate their religious tenets." Pet. App. 4a. Further, there is no debate that petitioners are religious groups as neither the "sincerity of their beliefs" nor the "centrality of those beliefs to their faiths" is in dispute. *Id.* Nor did the Court of Appeals dispute that the WHWA imposes a burden on petitioners' sincerely held religious beliefs. *Id.*

The Court of Appeals acknowledged that the WHWA, by its terms, provides a system of exemption based upon the characteristics of the religious employers. Thus, a religious entity is excluded from the WHWA's definition of "religious employer" if, for example, it does not "serv[e] primarily persons who share the religious tenets of the entity," or does not "primarily employ[] persons who share the religious tenets of the entity." Pet. App. 97a. As a result, under the WHWA, an otherwise exempt religious group that provides

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[4] For example, as part of its mission of evangelization, petitioner St. John the Baptist Church operates St. John the Baptist School, which serves not only children of the parish, but also non-Catholic children from its community. *See* St. John the Baptist School, *at* http://www.stjohnthebaptistrcc.org/Ministries%20-%20English.htm# School.

prescription drug benefits to its employees is required to violate its sincere religious beliefs if it ministers to members outside its faith, but not if it provides service only to individuals within its faith.

In the decision below, the New York Court of Appeals ruled that the WHWA was a "neutral" law of "general applicability" even though the WHWA "exempt[s] some religious institutions and not others" from its mandates. Pet. App. 6a. The Court of Appeals defended its conclusion by asserting that application of heightened scrutiny would "discourage the enactment of any such exemptions – and thus [would] restrict, rather than promote, freedom of religion." *Id.* at 6a-7a. Finally, even though the WHWA expressly discriminates among religious groups on facially religious grounds, the Court of Appeals held that the WHWA is "generally applicable and neutral *between* religions." *Id.* at 14a (emphasis added).

REASONS FOR GRANTING THE PETITION

Amici fully agree that review should be granted for the reasons set forth in the Petition. Consistent with the Question Presented in the Petition, *Amici* submit that review also should be granted because the New York Court of Appeals erroneously held that a State can, without meaningful First Amendment constraint, adopt laws that require some religious groups, but not others, to "violate their religious tenets by financing conduct that they condemn." Pet. App. 4a.

As shown in Part I, the decision below conflicts with decisions of the Third Circuit, which hold that where a "'State has in place a system for individual exemptions,'" it "'may not refuse to extend that system to cases of religious hardship without compelling reason.'" *Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359, 364 (3d Cir. 1999) ("*FOP*") (quoting *Employment Div.* v. *Smith*, 494 U.S. 872, 884 (1990)); see *Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004).

As shown in Part II, review also is warranted because the decision below conflicts with this Court's decisions ruling that when a State draws distinctions *among* religious groups, it must satisfy strict scrutiny. See *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 339 (1983); *Larson* v. *Valente*, 456 U.S. 228, 246 (1982).

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE THIRD CIRCUIT.

1. In its decision, the Court of Appeals acknowledged that the WHWA did not apply across the board to all employers. Rather, the WHWA created a system for exemptions for a limited number of religious employers. Under that system, "some religious organizations – in general, churches and religious orders that limit their activities to inculcating religious values in people of their own faith – are exempt from the WHWA's provisions on contraception," but other religious organizations are not. Pet. App. 6a. More specifically, under the WHWA, eligibility for the "religious employer" exemption is determined based upon a series of religion-specific factors including (i) the "purpose" of the religious entity, (ii) whether the employees of the religious entity share its "religious tenets," and (iii) whether the religious entity "serves primarily persons who share the religious tenets of the entity." *Id.* at 97a. The intended effect of these religion-specific criteria was to "exempt some religious institutions and not others." *Id.* at 6a.

Despite the fact that the WHWA treats religious employers differently based upon the "purpose" or mission of the religious employer and the "religious tenets" of its employees and those it serves, the Court of Appeals concluded that the WHWA is "neutral" and "generally applicable" for purposes of the First Amendment. Pet. App. 6a. In doing so, the New York Court of Appeals expressly adopted the analysis of the Supreme Court of California, which upheld a California statute "nearly identical to the WHWA." *Id.* at 7a; *see also*

Catholic Charities of Sacramento, Inc. v. *Superior Court*, 85 P.3d 67 (Cal.), *cert. denied*, 543 U.S. 816 (2004); Pet. 11 & n.6 (citing similar statutes passed in other states).

2. In contrast, the Third Circuit has adopted a fundamentally different approach to determining whether a law is "neutral" and "generally applicable." As then-Judge Alito explained, "in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *FOP*, 170 F.3d at 364 (quoting *Lukumi*, 508 U.S. at 537-38).

In *FOP*, the court of appeals considered a challenge by Sunni Muslim police officers to a department policy that prohibited them from wearing beards, but permitted exemptions from the no-beard policy for "medical reasons." *Id.* at 360. The *FOP* court concluded that the police officers' challenge to the no-beard policy was subject to heightened scrutiny under pre-*Smith* cases because the department created a system of exemptions for "individuals with a secular objection but not for individuals with a religious objection." *Id.* at 365. Applying heightened scrutiny, the Third Circuit concluded that the no-beard policy violated the Free Exercise Clause. *Id.* at 366-67.

Subsequently, in *Blackhawk* v. *Pennsylvania*, 381 F.3d 202 (3d Cir. 2004), the Third Circuit considered the claims of Dennis Blackhawk, a Lakota Indian who sought an exemption from a permit fee so that he could possess bears on his property for religious purposes. *Id.* at 204-05. The court of appeals agreed that "a 'neutral' and 'generally applicable' law that burdens conduct regardless of whether it is motivated by religious or secular concerns is not subject to strict scrutiny." *Id.* at 209. The Third Circuit held, however, that the Pennsylvania law requiring Blackhawk to pay a fee to keep bears on his property was not a law of "general applicability" because the law (i) also created an "individualized" system of exemptions, and (ii) included categorical exemptions for

"zoos and 'nationally recognized circuses.'" *Id.* at 209-11.[5] Applying strict scrutiny, the Third Circuit held that the Pennsylvania law could not be applied to Blackhawk because it was "doubtful" that it furthered a compelling governmental interest, and, in all events, the law was not properly tailored to serve any such interest. *Id.* at 214.

3. The decisions of the New York Court of Appeals (and the California Supreme Court) are in direct conflict with the Third Circuit as to the test for determining whether a law is "neutral" and "generally applicable" for purposes of the Free Exercise Clause.

In this case, the WHWA contains a system of exemptions that includes "individualized" assessments that turn on such matters as whether the religious entity "serves primarily persons who share the religious tenets of the entity," as well as relatively more categorical exemptions for entities for whom the "inculcation of religious values is the purpose of the entity."[6] Under *FOP* and *Blackhawk*, that system of exemptions would trigger strict scrutiny because, under Third Circuit law, a state's adoption of individualized or categorical exemptions within a statutory scheme means that the statute is

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[5] The conflict among the federal courts of appeals is not confined to the Third Circuit. Indeed, the Third Circuit has acknowledged that its interpretation of Smith in FOP has generated a conflict with two other federal courts of appeals which have held that "the Free Exercise Clause offers no protection when a statute or policy contains broad, objectively defined exceptions not entailing subjective, individualized consideration." *Tenafly Eruv Ass'n* v. *The Borough of Tenafly*, 309 F.3d 144, 166 n.27 (3d Cir. 2002) (citing *Swanson* v. *Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 701 (10th Cir. 1998), *American Friends Serv. Comm.* v. *Thornburgh*, 951 F.2d 957, 961 (9th Cir. 1991)).

[6] There can be no doubt that the WHWA creates a system of individual exemptions. To qualify for the exemption, a religious institution must satisfy four statutory requirements, three of which plainly require an individualized assessment of the nature of the institution's religious mission. Pet. App. 97a, 99a.

not "generally applicable" within the meaning of *Smith*. As a result, if petitioners' challenge to the WHWA were assessed within the Third Circuit, strict scrutiny would apply to petitioners' First Amendment challenge to the WHWA's system of exemptions.

Conversely, if the standards set forth by the New York Court of Appeals in this case (or the California Supreme Court in the parallel *Catholic Charities* case) were applied in *FOP* and *Blackhawk*, then the laws and policies at issue in those cases would have been subject to rational-basis review or no review at all. Under the decision below, a statute is "neutral" and "generally applicable" within the meaning of *Smith* even if it includes individualized or categorical exemptions. Pet. App. 6a. Indeed, according to the New York Court of Appeals (and the California Supreme Court), a statute remains "neutral" and "generally applicable" under *Smith* even if the state legislature creates a system of exemptions designed to benefit "some religious institutions and not others." *Id.*

Review is warranted to resolve this conflict between the Third Circuit, on the one hand, and the New York Court of Appeals and California Supreme Court, on the other.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT HOLDING THAT LAWS THAT DISCRIMINATE AMONG RELIGIOUS GROUPS MUST SATISFY STRICT SCRUTINY.

Unlike the WHWA, the systems for categorical and individual exemptions at issue in *FOP* and *Blackhawk* did not purport to discriminate *among* religious groups based on religious grounds. That distinction, however, merely underscores the need for review because this Court's cases have made clear that the First Amendment mandates that "laws discriminating *among* religions are subject to strict scrutiny." *Amos*, 483 U.S. at 339.

1. In *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, this Court reiterated the long-standing principle that the "protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs." 508 U.S. 520, 532 (1993). The *Lukumi* Court explained that the Free Exercise Clause prohibits statutes that "impose special disabilities on the basis of religious status,'" *id.* at 533 (alteration and ellipsis omitted) (quoting *Employment Div.* v. *Smith*, 494 U.S. 872, 877 (1990)), and thus precludes a government from applying "a municipal ordinance . . . to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant church service," *id.* (citing *Niemotko* v. *Maryland*, 340 U.S. 268, 272-73 (1951). Indeed, "the minimum requirement of neutrality is that a law not discriminate [against a religion] on its face." *Id.*

There can be no question that the WHWA discriminates *among* religious groups on religious grounds. This is not an instance where secular criteria are alleged to result in a disparate impact among religious groups. Cf. *Employment Div.* v. *Smith*, 494 U.S. 872 (1990). For example, the WHWA exempts religious entities that are "inward-looking" (their missions focus primarily on instructing, employing, and serving members of its own faith), but *excludes* "outward-looking" religious entities (whose religious mission encompasses hiring and serving people of other faiths). Pet. App. 97a. Under the authorities described above, such an exemption scheme is subject to strict scrutiny, and thus cannot survive a constitutional challenge absent a showing that it is narrowly tailored to further a compelling governmental interest.

2. The Court of Appeals' effort to reconcile its decision with these long-standing principles caused it to issue a ruling that flatly misconstrues this Court's decision in *Amos*.

In its decision, the Court of Appeals relied upon the analysis of the California Supreme Court addressing a

California statute nearly identical to the WHWA. Specifically, the court below quoted language from this Court's decision in *Amos* to argue that this Court "has never prohibited statutory references to religion for the purpose of accommodating religious practice" and has "repeatedly indicated that it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." Pet. App. 7a (quoting *Amos*, 483 U.S. at 335) (internal quotation marks omitted). That argument badly misreads this Court's decision in *Amos*.

In *Amos*, this Court explained that there is a critical distinction between "laws 'affording a uniform benefit to *all* religions'" and "laws discriminating *among* religions." 483 U.S. at 339. Where a law affords a uniform benefit to all religions, it is unquestionably "a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* at 335. But, a law that discriminates "*among* religions" is "subject to strict scrutiny." *Id.* at 339 (citing *Larson*, 456 U.S. at 246).[7]

Based upon this misreading of *Amos*, the decision by the New York Court of Appeals to reject strict scrutiny creates a square conflict with this Court's decision in *Larson*. At issue in *Larson* was a Minnesota statute that required charitable organizations to abide by a series of income reporting requirements. 456 U.S. at 231-32. Although the statute initially exempted all religious organizations, the legislature subsequently narrowed the exemption so that it extended only

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[7] The D.C. Circuit also has explained that the decision in *Amos* was animated by the general "prohibition on . . . intrusive inquiries into religious belief" to determine "which activities of a religious organization were religious and which were secular." *University of Great Falls* v. *NLRB*, 278 F.3d 1335, 1341-42 (D.C. Cir. 2002); *id.* ("'[C]ourts should refrain from trolling through a person's or institution's religious beliefs'") (quoting *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion)).

to religious organizations that obtained more than half of their contributions from their own members and affiliated organizations. *Id.* at 230-31. Under that narrowed definition, the Unification Church did not qualify as an exempt religious organization. *Id.* at 231-32.

The Supreme Court found that the statute "grant[ed] denominational preferences" which it defined as the granting of exemptions on the basis of "deliberate distinctions between different religious organizations." *Id.* at 246, 247 n.23. Although the Minnesota statute did not mention any organization or denomination by name, on its face, it did not "operate evenhandedly." *Id.* at 253. Accordingly, the Court explained that the statute would have to be "invalidated unless it [could be] justified by a compelling governmental interest, and unless it [was] closely fitted to further that interest." *Id.* at 246-47 (internal citation omitted).[8]

The WHWA is materially indistinguishable from the Minnesota statute invalidated in *Larson.* Like that statute, the WHWA includes an exemption available only to a subset of all religious organizations. *See id.* at 231. And, as in *Larson*, the New York legislature drafted the exemption with the express intention that it would provide relief only to some religious groups, and not others. Pet. App. 6a. Most significantly, the WHWA resembles the statute invalidated in *Larson* because they both create "denominational preferences." *Larson*, 456 U.S. at 246.

As noted, in *Larson*, this Court defined "denominational preferences" to mean a statute that "makes explicit and

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[8] *Larson* distinguished *Gillette* v. *United States*, 401 U.S. 437 (1971), because in that earlier case – which involved a challenge to the "conscientious objector" provision of the Military Selective Service Act – the governmental classification was based on "'individual conscientious belief'" and not upon distinctions between "religious organizations." 456 U.S. at 247 n.23. Here, as in *Larsen*, the WHWA makes "explicit and deliberate distinctions between different religious organizations." *Id.*

deliberate distinctions between different *religious organizations*." *Id.* at 246, 247 & n.23 (emphasis added). There can be no question that the WHWA likewise "makes explicit and deliberate distinctions between different religious organizations." *See id.* Indeed, in *Larson*, the "denominational preferences" took the form of an express distinction between religious groups whereby "only those religious organizations that received more than half of their total contributions from members or affiliated organizations would remain exempt from the registration and reporting requirements." *Id.* at 231-32. Here, the WHWA creates a preference for religious entities whose missions do not involve outreach to individuals outside their faiths, Pet. App. 97a, 99a, and disfavors religious entities that seek to serve individuals who do not share their "religious tenets." *Id.*

In the decision below, the Court of Appeals asserted that *Larson* is distinguishable because the WHWA distinguishes "between religious organizations based on the nature of their activities" and that is "not what *Larson* condemns." Pet. App. 14a-15a. But that is plainly wrong. *Larson* struck down a statute that distinguished between religious organizations on the basis of the manner in which they solicited contributions. 456 U.S. at 246, 247 n.23. The impermissible distinction among religious groups was based entirely on "the nature of their activities": religious groups that raised funds from their own members were not required to register, but religious groups which, by necessity, or "'as a matter of policy . . . favor public solicitation over general reliance on financial support from members'" were subject to reporting and registration requirements. *Id.* Review is warranted because the decision below is in direct conflict with *Larson*.

3. Lastly, the New York Court of Appeals sought to justify its ruling by asserting that religious liberty for *some* groups is preferable to religious liberty for *none*.

The Court of Appeals reasoned that imposition of a heightened standard of review for discriminatory exemptions

would "discourage the enactment of any such exemptions – and thus . . . restrict, rather than promote, the freedom of religion." Pet. App. 6a-7a. Put another way, the court below reasoned that if a State is denied free rein to discriminate in favor of some religious groups – and against others – then the legislature instead would choose to discriminate against *all* religious groups. That reasoning, however, runs contrary to this Court's jurisprudence reflecting that the First Amendment, at its core, mandates neutrality of treatment among religious groups.

It is a fundamental tenet of settled religious liberty jurisprudence that the State may not discriminate between religious institutions:

> Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least . . . benevolent neutrality towards churches and religious exercise generally *so long as none was favored over others and none suffered interference.*

Walz v. *Tax Comm'n*, 397 U.S. 664, 666-67 (1970) (emphasis added); see also *Board of Educ.* v. *Grumet*, 512 U.S. 687, 706-07 (1994) (holding that a religious accommodation that "singles out a particular religious sect for special treatment" violates the fundamental requirement of "neutrality as among religions"); *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953) (concluding that the free exercise rights of Jehovah's Witnesses were violated when an ordinance prohibiting religious meetings in a public park was applied to them but not to other religious groups).

Justice Harlan likened this neutrality inquiry to an "equal protection mode of analysis." *Walz*, 397 U.S. at 696 (Harlan, J., concurring). He noted:

> In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can fairly be concluded that religious institutions

> could be thought to fall within the natural perimeter. . . . Obviously the more discriminating and complicated the basis of classification for an exemption – even a neutral one – the greater the potential for state involvement in evaluating the character of the organizations.

Id. at 696, 698-99. Accordingly, "[t]he Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymander[ing]." *Id.* at 696.

The reason that the Supreme Court has mandated "neutrality" of treatment among religious groups is that "[f]ree exercise . . . can be guaranteed only when legislators - and voters – are required to accord to their own religions the same treatment given to small, new, or unpopular denominations." *Larson*, 456 U.S. at 245. As Justice Jackson explained in a separate context, "there is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

The First Amendment was designed to ensure that "every denomination would be equally at liberty to exercise and propagate its beliefs" and that "such equality would be impossible in an atmosphere of official denominational preference." *Larson*, 456 U.S. at 245. As such, the First Amendment unquestionably prohibits ""the state preferring some religious groups over [others]." *Fowler*, 345 U.S. at 69.

CONCLUSION

For these reasons, and those set forth in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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